TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910

No. 747 407

STELLA P. FLINT, AS GENERAL GUARDIAN OF THE PROPERTY OF SAMUEL N. STONE, JUNIOR, A MINOR, APPELLANT,

vs.

STONE TRACY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

FILED JANUARY 31, 1910.

(21,973.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22,1910.

1 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,

versus

STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and LEON B. HAYWARD, Defendants.

Bill of Complaint.

To the judges of the Circuit Court of the United States for the District of Vermont sitting in equity:

Stella P. Flint, a citizen of the State of Vermont and a resident of Windsor in said State, as General Guardian of the property of Samuel N. Stone, a minor, brings this her bill of complaint in behalf of herself, as such General Guardian, and all other stockholders who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit against the Stone Tracy Company, a corporation created and chartered by the State of Vermont and existing under and by virtue of a charter and franchise granted by the State of Vermont under and by virtue of the laws of said state, located and having its principal office for the transaction of business in the village and town of Windsor in the district and state of Vermont, and thereupon your orator complains and says as follows:

First. Your orator shows that the defendant, the said Stone Tracy Company, is a corporation duly chartered and created by the
2 State of Vermont and existing under and enjoying a charter and franchise granted by the state of Vermont and under and by virtue of the laws of said State; that the said corporation was incorporated on the first day of September, 1900, and that the capital stock of the said corporation consists and always has consisted of the sum of twenty thousand dollars ($20,000) divided into and represented by two hundred shares of the par value of one hundred dollars ($100) each.

Second. Your orator further shows that in and by the charter and franchise aforesaid, the defendant corporation was authorized to engage in and has, ever since the date of its incorporation, been engaged in the carrying on of a general retail mercantile business in the village and town aforesaid.

Third. Your orator further shows that in and by the laws of the state of Vermont it is among other things provided that the property, affairs and concerns of the defendant corporation shall be managed and conducted by the directors of the corporation, and, as your orator is informed and verily believes, the above-named defendants, Frank B. Tracy, Ida S. Tracy and Leon B. Hayward are citizens of the state of Vermont and residents and inhabitants of the district of Vermont and are the directors of the defendant corporation, duly elected as such and now acting in that capacity and managing and

conducting all and singular the property, affairs and concerns of the said defendant corporation.

Fourth. Your orator further shows that in the year 1866 Dwight Tuxbury and Samuel N. Stone, both of whom are now deceased, formed a co-partnership firm, of which they became the only partners, for the transaction of a general retail mercantile business in the village of Windsor, Vermont, and continuously carried on the same in said village under the firm name of Tuxbury and Stone for upwards of twenty-nine years at the same stand on the corner of the main street and a lane which leads to the railroad station. The business of the said firm of Tuxbury and Stone became very large in proportion to the population of the said village and was successful and profitable and increased in volume and became the principal general merchandise shop or store in an area of some ten square miles. The firm of Tuxbury and Stone from time to time took in other partners, but no essential change took place in the management until the year 1895 when the firm dissolved and two new firms were formed therefrom, one consisting of Dwight, Charles and William D. Tuxbury under the firm of Dwight Tuxbury and Sons, and the other consisting of Samuel N. Stone, Shirley G. Stone and Frank B. Tracy under the firm name of Stone, Tracy and Company. The firm of Stone, Tracy and Company engaged in the same class of business as had theretofore been carried on by the old firm of Tuxbury and Stone and at the original stand. The firm of Dwight Tuxbury and Sons erected a new building next door and immediately north of the Stone, Tracy and Company stand and engaged in the same line of business. In the year 1900 the persons composing the firm of Stone, Tracy and Company, associating with themselves other persons, applied to and obtained from the state of Vermont a corporate charter and franchise to carry on a general mercantile business and under and by virtue of such charter and franchise so granted by the state of Vermont they organized a corporation called the Stone Tracy Company, one of the defendants, which took over all the business of the firm of Stone, Tracy and Company and which has ever since been conducting a general mercantile business at the original stand of Tuxbury and Stone hereinbefore referred to. During each of the five years last past the defendant corporation has transacted a business of from not less than $75,000 to $100,000. Through unremitting and wise business endeavor the defendant corporation has prospered and has transacted a business approximating in volume that transacted during the same period by the firm of Dwight Tuxbury and Sons. The firm of Dwight Tuxbury and Sons and the defendant corporation have each continued to carry on a general retail mercantile business along similar lines next door to each other and in constant and active competition, with the result that there is now no other shop or store for the sale of general merchandise in the village or township of Windsor and no other such shop or store of anywhere near their size or importance within an area of twenty square miles.

Fifth. Your orator further shows that the said charter and franchise were granted and obtained for a large and valuable consider-

ation paid by the incorporators to the state of Vermont at the date of the incorporation of the defendant corporation and that the said charter and franchise have since then been continued in force by the state of Vermont in consideration of annual payments, called franchise taxes, paid by the defendant corporation to the state of Vermont.

Sixth. Your orator further shows that she is a citizen of the state of Vermont and a resident of the town of Windsor in the District and State of Vermont and that by the Probate Court for the District of Windsor and State of Vermont, the said court having jurisdiction in the premises, she was duly appointed General Guardian of
5 the property of Samuel N. Stone, Junior, a minor, by order of said Probate Court duly entered and filed the 20th day of November, 1899, and that she immediately duly qualified as such guardian and ever since has been acting in that capacity. And your orator further shows that at the date of the incorporation of the defendant corporation she became as such guardian the owner and holder of forty shares of the capital stock in said defendant corporation and that she ever since has been and still is a stockholder in the defendant corporation owning and holding in her right as Guardian aforesaid the said forty shares of its capital stock. The capital stock of the defendant company is divided among a number of different persons and this suit is for an object common to them all. Your orator, therefore, brings this suit in her own name as such Guardian and in that behalf as a stockholder in said corporation and also as a representative and on behalf of such of the other stockholders similarly situated and interested as may choose to intervene and become parties hereto.

Seventh. Your orator further shows that as she is informed and verily believes the defendant corporation and a majority of its directors who are managing and conducting its property, affairs and concerns assume to believe that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes", approved August 5, 1909, the defendant company is required to make, on or before the 1st day of March, 1910, to the collector of internal revenue for the district in which the defendant corporation has its prin-
6 cipal place of business, a true and accurate return under oath or affirmation of its president, vice president or other proper officer and its treasurer or assistant treasurer, setting forth, among other things, the total amount of the bonded and other indebtedness of the defendant corporation at the close of the year 1909, the gross amount of the income of the defendant corporation received during the year 1909 from all sources, the amount received by the defendant corporation within the year 1909 by way of dividends upon stock of other corporations, the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of the defendant corporation during the year 1909, stating separately all charges such as rentals or franchise payments required to be made

as a condition to the continued use or possession of property, the total amount of all losses actually sustained during the year 1909 and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, the amount of interest actually paid within the year 1909 on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the paid-up capital stock of the defendant corporation outstanding at the close of the year 1909 and the amount paid by the defendant corporation during the year 1909 for taxes imposed under the authority of the United States or any state or territory thereof and the net income of the defendant corporation for the year 1909 after making the deductions authorized in Section 38, subdivision 3rd, of the said Act, and by virtue of said Act is required to pay on or before the 30th day of June, 1910, an assessment described in said Act as a special excise tax with respect to the carrying on
7 or doing business by the said corporation equivalent to one per centum upon the entire net income over and above five thousand dollars ($5,000) received by it from all sources during the year 1909, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax thereby imposed. And your orator shows that as she is informed and verily believes they intend to require the officers of the defendant corporation specified in said Act to make and file with the said collector of internal revenue the return aforesaid as prescribed in the said Act and intend to pay the said assessment if any shall be levied.

Eighth. Your orator further shows that pursuant to the terms of said Act the said return, if made, and the returns of other corporations, if made, shall as received by the collector of internal revenue be transmitted forthwith by the collector to the commissioner of internal revenue; that all such returns shall be retained by the commissioner of internal revenue who shall make assessment thereon on or before the first day of June, 1910, and that when the assessment is so made all of the said returns, including that of the defendant corporation, shall be filed in the office of the commissioner of internal revenue and shall constitute public records and be open to inspection as such.

Ninth. Your orator further shows that, as she is informed and verily believes, the inventory and the taking account of stock of the defendant corporation and the figuring of its income, expenditures, profits and losses for the year 1909 are not yet complete and that she does not know and therefore cannot allege the amount of the
8 net income of the defendant corporation for the year 1909; and your orator avers that an allegation of the amount of the net income of the defendant corporation should not, in any event, be required since such allegation, if made herein, would defeat in large part the object of this bill and would disclose to the said firm of Dwight Tuxbury and Sons and to the public generally a fact which your orator seeks by this bill and by the aid of this Honorable Court to keep private.

Your orator, however, further shows that as she is informed and

verily believes, the net income of the defendant corporation for the year ending Dec. 31, 1909, when ascertained according to the method prescribed in said Act, will be found to exceed the sum of five thousand dollars and that if the said return shall be made an assessment as provided in said Act will be made against the defendant corporation.

Tenth. Your orator further shows that, as she is informed and verily believes, in alleged compliance with the requirements of the Act of Congress aforesaid the defendant company and a majority of its said directors have avowed their intention and purpose voluntarily to make and file with the collector of internal revenue for the district in which the principal office of the defendant corporation is situated, prior to the first day of March, 1910, a return setting forth the business and income of the defendant corporation during the year 1909 as hereinbefore described and have likewise avowed their intention and purpose voluntarily to pay the said assessment if any is levied.

Eleventh. Your orator avers that the provisions of the tax on corporations provided for in the said Act of Congress as aforesaid are unconstitutional, null and void in that the requirement to make and file the said return and that the requirement that such return shall become a matter of public record and the requirement to pay said tax are burdens and taxes upon the said charter and franchise granted as aforesaid by the state of Vermont and on the right and power of the state of Vermont to grant, maintain and preserve the same to the defendant corporation, and are a burden and tax upon a prerogative, power, instrumentality and function of sovereignity belonging to the state of Vermont and which were never agreed to either expressly or by implication by the state of Vermont or the people of the state of Vermont at the time the said state was admitted into the Union, or before or since that time.

Twelfth. Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void, and in violation of the fifth amendment of the Constitution of the United States in that under said provisions of law the defendant corporation will be deprived of its property without due process of law, and especially in this: that through the publicity of its business the privacy of its affairs will be largely destroyed, that its chief competitor, the said firm of Dwight Tuxbury and Sons, and all other persons will be able to gain an intimate knowledge of what have hitherto been the private affairs of the defendant corporation and its trade secrets while no corresponding publicity of the private affairs and trade secrets of the said firm of Dwight Tuxbury and Sons will be required and no similar invasion of the private affairs or trade secrets of the said firm of Dwight Tuxbury and Sons will be permitted; that the said assessment, if made, will be laid upon the defendant corporation and not upon its chief competitor, the said firm of Dwight Tuxbury and Sons, although said firm is carrying on the same character of business next door to the place of business of the defendant corporation and employing, as your orator is informed and verily believes, approximately the same

amount of capital; and that by reason of the said unjust advantage which would be given to the said firm of Dwight Tuxbury and Sons by a compliance with the said provisions of the said Act of Congress your orator avers that the business of the defendant corporation is dangerously threatened and that the defendant corporation will be forced to surrender to the state of Vermont the charter and franchise granted as aforesaid and which it now owns and has a right to enjoy and will be obliged to dispose of its assets, wind up its affairs and go into voluntary dissolution.

Thirteenth. Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the fifth amendment to the Constitution of the United States in that under said provisions of law the private property of the defendant corporation will be taken for public use without just compensation and without any compensation whatever, and especially in this: that the private affairs, books, papers, records, business and trade secrets of the defendant corporation and the contents of its books, papers, and records are taken for publication and will be given to the collector of internal revenue and to the commissioner of internal revenue and to the public in the form of public records.

Fourteenth. Your orator further avers that the said pro-
11 visions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the fourth amendment to the Constitution of the United States and violate the right of the defendant corporation to be secure in its papers, effects, books records, business, private affairs and trade secrets against unreasonable searches and seizures, in this: That by said provisions of law the defendant corporation will be obliged to disclose to its chief competitor, the said firm of Dwight Tuxbury and Sons, and also to the collector of internal revenue and the commissioner of internal revenue and to the public, its papers, effects, books, records, business, private affairs and trade secrets and the contents of its papers, books and records in the respects hereinbefore specified and as specified in said Act.

Fifteenth. Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the Constitution of the United States in that the depriving of the defendant corporation of its property without due process of law and the taking of the private property of the defendant corporation for public use without just compensation and the violation of the right of the defendant corporation to be secure in its papers and effects against unreasonable searches and seizures as hereinbefore set forth, are a burden upon the said charter and franchise granted as aforesaid by the state of Vermont and upon the right and power of the State of Vermont to grant, maintain and preserve the same to the defendant corporation, and are an invasion and burden upon a prerogative, power, instrumentality and function of sovereignty belonging to the state of Vermont and
12 which were never agreed to either expressly or by implication by the State of Vermont or the people of the state of Vermont

at the time the said state was admitted into the Union or before or since that time.

Sixteenth. Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the tenth amendment to the Constitution of the United States in that the requirements of said provisions are a burden and tax upon and an interference with the powers of the state of Vermont and the other states of the Union expressly reserved to charter and incorporate corporations and to grant charters and franchises to such corporations.

Seventeenth. Your orator further avers that the said provisions of the Act of Congress aforesaid are unconstitutional, null and void and in violation of the Constitution of the United States in that the said so-called special excise tax with respect to carrying on or doing business, is not, in reality, a special excise tax with respect to carrying on or doing business by the defendant corporation or by any corporation or joint stock company or association, except insurance companies, but is, in reality, a direct tax upon the said charter and franchise of the defendant corporation and the charters and franchises of all other corporations within the provisions of said Act and is not apportioned among the several states according to their population as required by the Constitution of the United States.

Eighteenth. Your orator further avers that if the said tax shall be held not to be a direct tax upon the charter and franchise
13 of the defendant corporation and upon the charters and franchises of all other corporations, except insurance companies, within the provisions of said Act, then the said provisions are unconstitutional, null and void in that the said provisions and the said tax are not uniform throughout the United States or throughout any one of the United States or its territories or the District of Columbia or Alaska; and your orator avers that such provisions and the said tax are not uniform within the class or in respect to the property or subjects selected for taxation, except insurance companies, and that the said provisions and tax, while stated to embrace and affect and be levied upon the carrying on and doing of business in reality touch only corporations and joint stock companies, and leave free from the operation of said provisions and tax all individuals and co-partnership firms although carrying on and doing the same business or the same kind of business or the same class of business as the corporations and joint stock companies. And your orator further avers that in many other respects the said provisions and the said tax are not uniform throughout the United States and that the said provisions and tax are therefore unconstitutional, null and void.

Nineteenth. Your orator further shows that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance and that she has duly requested the defendant corporation and its directors and each of them in writing to omit and refuse to prepare and file the said return and to refrain from paying the said tax and to contest

the constitutionality of the said provisions of law and to
14 apply to a court of competent jurisdiction to determine the liability under the said provisions, and that a copy of said request is hereto annexed and marked "Exhibit A" and made a part of this bill of complaint; but that the defendant corporation and a majority of its directors have refused and still refuse and intend omitting to comply with your orator's demand and, as your orator is informed and verily believes, have resolved and determined and intend to comply with all and singular the said provisions of the said Act of Congress and to make and file the return aforesaid with the collector of internal revenue and voluntarily pay the said assessment if any is made. A copy of the refusal of the defendant corporation and a majority of its directors is hereby annexed to this bill of complaint and marked "Exhibit B."

Twentieth. Your orator further shows that if the said return is made and filed it will result, as hereinbefore alleged, in great and irreparable injury to the defendant corporation and its business and to your orator and to all other stockholders of the defendant corporation and will involve the defendant corporation in great and irreparable damage, all to the irreparable damage of your orator and all of the stockholders of the defendant corporation.

Twenty-first. Your orator further shows that this is a suit of a civil nature in equity arising under a law of the United States providing internal revenue and properly cognizable by this honorable court.

All of which actings, doings and pretenses of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore and in consideration whereof and forasmuch
15 as your orator is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable,

Your orator prays:

1. That it may be adjudged and decreed that the said provisions of the said Act of Congress approved August 5, 1909, so far as the same relate to a tax upon corporations are unconstitutional, null and void.

2. That the defendants be restrained from voluntarily complying with the said provisions of the said Act of Congress and making the return above referred to or from paying the assessment if any is levied.

3. And that your orator may have such other or further or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said Stone Tracy Company, under its corporate seal, and the said individual defendants, not under oath—an answer under oath being hereby expressly waived—to each and all of the matters

and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto: may it please your honors to grant unto your orator a subpœna ad respondendum issuing out of and under the seal of this honorable court, to be directed to the said defendants, the Stone Tracy Company,
16 Frank B. Tracy, Ida S. Tracy and Leon B. Hayward commanding them and each of them on a certain day and under a certain penalty to be therein inserted to appear before your honors in this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises; and further to perform and abide by such further order and decree as to your honors shall seem meet; and also a writ of provisional injunction and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orator, as in duty bound, will ever pray, etc.

ERNEST W. GIBSON,
Solicitor for Complainant.

MAXWELL EVARTS,
Of Counsel.

17 UNITED STATES OF AMERICA,
District of Vermont, ss:

Stella P. Flint, being duly sworn, deposes and says that she is the General Guardian of the property of Samuel N. Stone, Jr., a minor, and as such General Guardian is the complainant named in the foregoing bill of complaint; that she has read the said bill and knows the contents thereof and that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters she believes it to be true.

STELLA P. FLINT.

Subscribed and sworn to before me this 15th day of January, 1910.

GILBERT A. DAVIS,
[L. S.] *Notary Pubic.*

18 EXHIBIT A.

To Stone Tracy Company and the directors of said Company:

As General Guardian of the property of Samuel N. Stone, Junior, a minor, I am a stockholder in the Stone Tracy Company. I understand that the company intends to make a return of its business in conformity with the provisions of Act of Congress of August 5, 1909, relating to the corporation tax. These provisions, as I am advised by counsel, are and I claim them to be unconstitutional.

To make this return to the collector of internal revenue which will involve its early publication will obviously be a great disadvantage to the company and injurious to its business. I request that you will not voluntarily make and file this return or pay the tax if any is

assessed and I request that for the protection of the company, its business and its stockholders, you will contest the constitutionality of the provisions of this Act which require the making and filing of the return and the payment of the tax.

STELLA P. FLINT.

Dated Windsor, Vt., Jan. 1, 1910.

19 EXHIBIT B.

WINDSOR, VT., *Jan.* 3, 1910.

Mrs. Stella P. Flint, Windsor, Vt.

MADAM: In response to your letter of the 1st inst. we beg to say that while there may be doubt as to the constitutionality of the corporation tax, we do not feel it best for us to get into litigation with the government and we prefer to leave to some larger concern the responsibility and expense of contesting the law.

We may suggest, however, that if the corporation tax is enforced against us we can dissolve the company and form a firm to take over the business so that after this year we shall be outside the provisions of the law.

Yours very truly,

STONE TRACY COMPANY,
By FRANK B. TRACY,
General Manager.

FRANK B. TRACY,
IDA S. TRACY,
A Majority of the Directors of Stone Tracy Company.

20 (Endorsed:) United States Circuit Court. District of Vermon. Stella P. Flint, as General Guardian of the property of Samuel N. Stone, Junior, a minor, Complainant, versus Stone Tracy Company, Frank B. Tracy, Ida S. Tracy, and Leon B. Hayward, Defendants. Bill in Equity. Filed January 15, 1910. Annie M. Brown, Deputy Clerk.

21 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,
versus
STONE TRACY COMPANY, FRANK B. TRACY, IDA D. TRACY, and LEON B. HAYWARD, Defendants.

The Demurrer of Stone Tracy Company and the Other Defendants Above-named to the Complainant's Bill of Complaint Herein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein

set forth and alleged, do demur to the said bill and for cause of demurrer show that said bill doth not contain any matter of equity whereon this Court can ground any degree or give to the complainant any relief against these defendants or any one or more of them, and that it appeareth by the complainant's own showing by the said bill that she is not entitled to the relief prayed by the said bill against these defendants.

Wherefore, and for divers other good causes of demurrer
22 appearing in the said bill, these defendants separately and severally demur thereto and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

GILBERT F. DAVIS,
Solicitor for Defendants.

I, Gilbert F. Davis, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

GILBERT F. DAVIS.

UNITED STATES OF AMERICA,
District of Vermont, ss:

I, Frank B. Tracy, being duly sworn, depose and say: That I am the General Manager of the above-named defendant, Stone Tracy Company, and am one of the individual defendants above-named and that the foregoing demurrer is not interposed for purposes of delay.

FRANK B. TRACY.

Sworn to before me, this 15th day of January, 1910.

[Seal Gilbert F. Davis, Notary Public, Windsor County, State of Vermont.]

GILBERT F. DAVIS,
Notary Public.

23 (Endorsed:) Stella P. Flint vs. Stone Tracy Co., et al. United States Circuit Court, District of Vermont. Demurrer. Gilbert F. Davis, Solicitor for Defendant. Filed January 15, 1910, Annie M. Brown, Deputy Clerk.

24 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,
versus
STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and LEON B. HAYWARD, Defendants.

Please take notice that this cause will be brought to a hearing on bill and demurrer filed therein before Honorable James L. Martin, District Judge, on the 20th day of January, 1910 at 9.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated Brattleboro, Vermont, January 15th, 1910.

ERNEST W. GIBSON,
Solicitor for Complainant, Brattleboro, Vermont.

To Gilbert F. Davis, Esq., Solicitor for Defendants, Windsor, Vermont.

25 (Endorsed:) United States Circuit Court, District of Vermont. Stella P. Flint, as General Guardian of the property of Samuel N. Stone, Junior, a minor, Complainant, versus Stone Tracy Company, Frank B. Tracy, Ida S. Tracy and Leon B. Hayward, Defendants. Notice of Hearing. Due and timely service of the within notice is hereby admitted. Jan. 15, 1910. Gilbert F. Davis, Solicitor for Defendants. Filed January 15, 1910. Annie M. Brown, Deputy Clerk.

26 At a Term of the Circuit Court of the United States for the District of Vermont, Held at the United States Court House at Brattleboro, Vermont, this 20th day of January, 1910.

Present: Hon. James L. Martin, District Judge.

In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,
versus
STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and LEON B. HAYWARD, Defendants.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having been heard in support of said demurrer and in opposition thereto, it is by the Court now here—

Ordered and decreed that the said demurrer be sustained and that the bill of complaint above-named be and the same is hereby dismissed with costs.

JAMES L. MARTIN,
U. S. D. Judge.

Thereupon, the above-named complainant states that in this case the constitutionality of a law of the United States is drawn
27 in question, and in open Court prays an appeal from said final decree direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided. It is, therefore, further—

Ordered that the said appeal be and the same hereby is allowed as prayed for in open Court.

The said defendants then admitted in open Court due notice of the said appeal and duly waived service of any citation thereon.

JAMES L. MARTIN,
U. S. D. Judge.

(Endorsed:) United States Circuit Court, District of Vermont. Stella P. Flint, as General Guardian, etc., Complainant, vs. The Stone Tracy Company et al., Defendants. Final decree sustaining Demurrer and allowing appeal. Gilbert F. Davis, Solicitor for Defendant. Filed January 20, 1910. Frederick S. Platt, Clerk.

28 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,
versus
STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY and LEON B. HAYWARD, Defendants.

And now comes the complainant above-named by Ernest W. Gibson Esq., her solicitor, and in connection wiith the complainant's petition of appeal from the final decree made and entered herein on the 20th day of January, 1910, dismissing the complainant's bill of complaint with costs, makes and files the following assignment of errors in pursuance of the statute and rule in such case made and provided:

I.

That the Court erred in not holding that so much of the act of Congress of the United States, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes", approved August 5, 1909, as relates to the assessment and collecting of a tax on the net income of corporations and the filing of returns of corporations, as specified in section 38 of the said act, was unconstitutional and void, in that such sec-
29 tion violates sections 2 and 8 of Article I. and amendments IV., V., and X. of the Constitution of the United States.

II.

That the Court erred in not granting to the complainant the relief prayed in and by her bill or any part thereof.

III.

That the Court erred in sustaining the demurrer to said bill.

IV.

That the Court erred in dismissing the said bill with costs.

Dated Brattleboro, Vermont, January 20, 1910.

ERNEST W. GIBSON,
Solicitor for Complainant.

(Endorsed:) United States Circuit Court, District of Vermont. Stella P. Flint, as General Guardian, Complainant, vs. The Stone Tracy Company et al., Defendants. Assignments of Errors. Ernest W. Gibson, Solicitor for Complainant. Filed January 20, 1910. Frederick S. Platt, Clerk.

30 United States Circuit Court, District of Vermont. In Equity.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor, Complainant,
versus
STONE TRACT COMPANY, FRANK B. TRACY, IDA S. TRACY and LEON B. HAYWARD, Defendants.

Know all men by these presents, that we, Stella P. Flint and Walter J. Saxie of Windsor in the County of Windsor and State of Vermont, are held and firmly bound unto the above-named defendants in the sum of Five Hundred Dollars ($500) to be paid to the said defendants; for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 20th day of January, in the year of our Lord one thousand nine hundred and ten.

The condition of this obligation is such that,

Whereas, the said defendants above-named have obtained a decree in the Circuit Court of the United States for the District of Vermont sustaining the defendants' demurrer and dismissing the bill of complaint of the complainant with costs, which said decree was entered on the 20th day of January, 1910, and

Whereas, the said complainant, in order to obtain the re-
31 versal of the same hath obtained the allowance in open court of a petition of appeal to the Supreme Court of the United States;

Now, therefore, if the above-named Stella P. Flint, as General Guardian of the property of Samuel N. Stone, Jr., a minor, shall prosecute her said appeal to effect, and if she fail to make her appeal good, shall answer all damages and costs, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

STELLA P. FLINT. [L. S.]
WALTER J. SAXIE. [L. S.]

Sealed and delivered and taken and acknowledged this 20th day of January, 1910.

[SEAL.] FRANK H. CLARK,
Notary Public.

Approved by:

JAMES L. MARTIN,
U. S. D. Judge.

(Endorsed:) United States Circuit Court, District of Vermont. Stella P. Flint as General Guardian, etc., Complainant, vs. The Stone Tracy Company et al., Defendants. Bond on Appeal. Ernest W. Gibson, Solicitor for Complainant. Filed January 20, 1910. Frederick S. Platt, Clerk.

32 UNITED STATES OF AMERICA,
District of Vermont, ss:

I, Frederick S. Platt, Clerk of the Circuit Court of the United States of America for the District of Vermont, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to thirty-one inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Stella P. Flint, as General Guardian of the property of Samuel N. Stone, Junior, a minor, Complainant, versus Stone Tracy Company, Frank B. Tracy, Ida S. Tracy and Leon B. Hayward, Defendants, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of said Court to be hereunto affixed, at Brattleboro, in the District of Vermont, in the Second Circuit, this 20th day of January, in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States the one hundred and thirty-fourth.

[Seal of the U. S. Circuit Court, Dist. of Vermont.]

FREDERICK S. PLATT, *Clerk.*

Endorsed on cover: File No. 21,973. Vermont C. C. U. S. Term No. 747. Stella P. Flint, as general guardian of the property of Samuel N. Stone, Junior, a minor, appellant, vs. Stone Tracy Company et al. Filed January 21st, 1910. File No. 21,973.

Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 497

STELLA P. FLINT, as General Guardian of the Property of SAMUEL B. STONE, Junior, a minor,

Appellant,

vs.

THE STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and LEON B. HAYWARD,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

MOTION TO ADVANCE UNDER RULE 24.

MAXWELL EVARTS,

of Counsel for Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 747.

STELLA P. FLINT as General Guardian of the property of SAMUEL N. STONE, Junior, a minor,
Appellant,
vs.
THE STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY and LEON B. HAYWARD,
Appellees.

APPEAL FROM THE
CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

MOTION TO ADVANCE UNDER RULE 26.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

In this cause the constitutionality of a law of the United States is drawn in question. The complainant specifically alleges that the provisions of the Act of Congress, approved August 5, 1909, and entitled "An Act to provide

revenue, equalize duties and encourage the industries of the United States and for other purposes," so far as they relate to the so-called "corporation tax" are unconstitutional.

The complainant, as a stockholder of the defendant corporation, has brought this suit in her own behalf as guardian of a minor (and in behalf of other stockholders similarly situated) against the defendant corporation and its directors, alleging that the defendants, in compliance with such act, purpose making a return of the net income of the defendant corporation and also purpose paying a tax, if any shall be levied, on such net income in excess of $5,000. She alleges that the provisions of law which purport to require the making of such return and the payment of such tax are unconstitutional, and she seeks to restrain the threatened voluntary compliance by the defendants with such provisions on the ground that it would be a breach of trust in disclosing the private affairs of the defendant corporation and diverting its funds. The case, therefore, presents a ground for the intervention of a court of equity and the circuit court had jurisdiction of the cause as one arising under a law of the United States providing internal revenue.

II.

Briefly, the bill alleges that the defendant corporation is a trading company carrying on a retail mercantile business in active competition with another trading company carrying on the same line of business, but as a co-partnership; that the co-partnership is not required by the Act in question to make any return or pay any tax; that the provisions of law requiring the making and publishing of a return and the paying of the tax not only work an undue advantage to the co-partnership firm and other competitors of the defendant corporation and work a corre-

sponding disadvantage to the defendant corporation, but are, in effect, an unconstitutional invasion of the right of the State of Vermont to grant and preserve to the defendant corporation a corporate charter and franchise; that the above discrimination between the defendant corporation and the co-partnership amounts to a taking of the property of the defendant corporation without due process of law; that the publishing of the return involves the taking of private property for public use without compensation; that the corporation tax is a direct tax upon the franchise of the defendant corporation and not apportioned as direct taxes are required to be; that if it is not a direct tax, then the inclusion of corporations and the exclusion of co-partnerships and individuals, though engaged in the same business, prevent the corporation tax from being uniform throughout the United States.

III.

The cause came on to be heard on bill and demurrer in the United States Circuit Court for the District of Vermont, whence, the demurrer being sustained, the complainant prayed an appeal to the Supreme Court of the United States, which was duly allowed.

IV.

The case involves issues of public importance. A decision in this cause affects a great majority of the corporations in the United States. The terms of the Act in question, unless some extension of time can be obtained by public authority, require the return of the income of the defendant corporation and all other corporations within the provisions of the Act to be made and filed on or before the first day of March, 1910.

V.

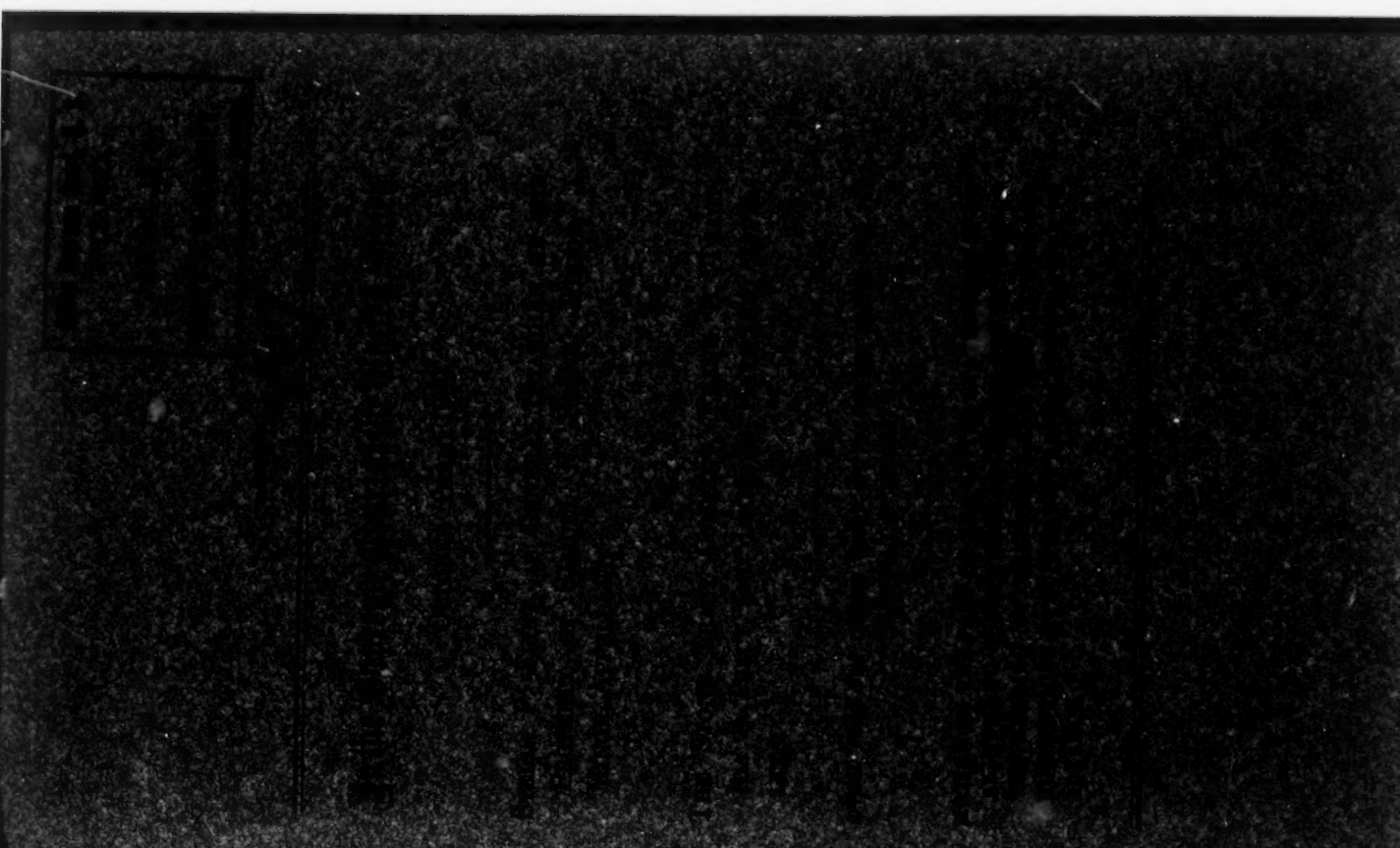
The appellant, therefore, prays this Honorable Court that this case may be advanced upon the docket and heard at as early a day as may be convenient to the Court.

Notice of this motion has been served on counsel for the appellees and proof of service filed with the Clerk of this Court. Notice has likewise been given to the Attorney-General of the United States and to the Solicitor General of the United States.

Washington, January 21, 1910.

Respectfully submitted,

MAXWELL EVARTS,
Of Counsel for Appellant.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

STELLA P. FLINT, AS GENERAL GUARDIAN of the property of Samuel N. Stone, junior, a minor, appellant,

v.

THE STONE TRACY COMPANY, FRANK B. Tracy, Ida S. Tracy, and Leon B. Hayward, appellees.

No. 747.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

MOTION ON THE PART OF THE UNITED STATES THAT IT BE ALLOWED TO SUBMIT ORAL ARGUMENT AND BRIEF UPON THE HEARING OF THE ABOVE-ENTITLED CAUSE; AND SUGGESTIONS IN SUPPORT OF APPELLANT'S MOTION TO ADVANCE.

On behalf of the United States the Solicitor-General moves the court that the United States may submit both oral argument and brief upon the hearing of this cause, and also offers these suggestions in aid of appellant's motion that the cause be advanced for hearing at the present term.

1. The suit presents the general question of the constitutionality of the so-called "Federal corporation tax," imposed by section 38 of the act of Congress of August 5, 1909 (36 Stat., 11), as "a special excise

tax with respect to the carrying on or doing business" by "every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia."

2. Verified returns are required to be made by the corporation "on or before the first day of March, nineteen hundred and ten" (third paragraph of the act), as a basis for ascertainment and collection of the tax against it. Payment of the tax is required "on or before the thirtieth day of June" next, and heavy penalties are imposed for failure of such timely payment (fifth paragraph of the act).

3. Among the many specific questions of the highest importance which are involved in the general inquiry concerning the constitutionality of this taxing law are the following:

Whether the tax is direct in the constitutional sense and is void because not apportioned among the States in proportion to their population.

Whether the tax improperly interferes with the general power of the States to create corporations.

Whether the tax is invalid in so far as the net income of a corporation may be attributable to

state or municipal bonds held by the corporation as part of its business capital.

Whether the tax is invalid in the case of public-service corporations chartered by a State.

Whether the taxing act makes an improper distinction between corporations on the one hand and partnerships and individuals on the other hand, engaged in the same business.

Whether the exemptions enumerated in the statute are sustainable.

4. The deep interest of both the Government and of citizens affected by the tax throughout the country in a determination by this court concerning the constitutionality of the taxing act before the close of the period for payment of the tax, June 30 next, is apparent; and the Government therefore expresses its entire accord with the motion which appellant has submitted that the cause be advanced and set for hearing on a day during the present term.

LLOYD W. BOWERS,
Solicitor General.

JANUARY, 1910.

O

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. ~~747~~ 407

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

STELLA P. FLINT, as General Guardian of the Property of SAMUEL N. STONE, Junior, a Minor,

Appellant,

vs.

STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and LEON B. HAYWARD,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

BRIEF FOR APPELLANT.

MAXWELL EVARTS,
HENRY S. WARDNER,
of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 747.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor,

Appellant,

vs.

STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY, and LEON B. HAYWARD,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

BRIEF OF THE APPELLANT.

Statement.

In the year 1866 Dwight Tuxbury and Samuel N. Stone, both of whom are now deceased, formed a co-partnership for carrying on a general retail mercantile business in the village of Windsor, Vermont, and that firm, called Tuxbury & Stone, carried on such business continuously, on the main street of the village, for upwards

of twenty-nine years. The business was prosperous, and its shop became the principal one of its kind, not only in the village, but in an area of some ten square miles of the surrounding country. While the firm, from time to time, took in other partners, there was no essential change in the management until 1895, when the firm dissolved and two new firms were formed therefrom. One of the new firms was headed by Tuxbury, and was styled Dwight Tuxbury & Sons, while the other was headed by Stone, and was styled Stone, Tracy & Company.

The firm of Stone, Tracy & Company retained the original stand of Tuxbury & Stone, and engaged in the same business as had been carried on by the old firm. The firm of Dwight Tuxbury & Sons erected a building on the same street, and next door to Stone, Tracy & Company, and engaged in the same line of business.

In the year 1900 the persons composing the firm of Stone, Tracy & Company obtained from the State of Vermont a corporate charter, and, under such charter, organized a corporation, called the Stone Tracy Company, for carrying on a general retail mercantile business. The defendant corporation is the corporation so formed. It took over all the business of the firm of Stone, Tracy & Company, and has continued to carry on at the original stand of Tuxbury & Stone a general retail mercantile business. In carrying on such business it has met the direct, active, and constant competition of the firm of Dwight Tuxbury & Sons, which firm has continued to carry on a general retail mercantile business next door to the shop of the defendant corporation and employing about the same amount of capital. The defendant cor-

poration has prospered, and has transacted, during each of the last five years, a business of not less than from $75,000 to $100,000, which, in volume, approximates that carried on by its competitor. Continuing to compete next door to each other, these two shops have become the only general merchandise shops in the village, and the principal ones in a surrounding area of twenty square miles.

A return of the business of the defendant corporation if made as required by the provisions of the Act of Congress of August 5, 1909, relating to the so-called "corporation tax," through becoming a public record, will disclose to the firm of Dwight Tuxbury & Sons and to the public generally the gross income of the defendant corporation, its indebtedness, its dividends received, its expenses paid, its charges for depreciation, its rentals and franchise payments, its losses sustained, the interest paid on its debts, the amount of its taxes and its net income. The net income of the defendant corporation will exceed $5,000, and the corporation tax will therefore be assessed. Since, under the provisions of the law, no such return and no such tax can be required of copartnerships, the firm of Dwight Tuxbury & Sons would be given a great advantage over the defendant corporation through the disclosure of the details of the business and private affairs and trade secrets of the defendant corporation, while no such disclosure of the affairs of the firm of Dwight Tuxbury & Sons would be required or permitted. The advantage thus given to the competitor of the defendant corporation would compel the defendant corporation to surrender its corporate charter, dispose of its assets and go into voluntary dissolution.

The complainant, as a stockholder of the Stone Tracy Company, requested the defendants to contest the constitutionality of the corporation tax law and not to comply with its provisions, but the defendants refused to do so and assert that they intend to make the return and pay the tax.

Thereupon the appellant, who was the complainant in the Court below, brought, in the United States Circuit Court for the District of Vermont, her bill in equity as a stockholder in the defendant corporation to restrain it and its directors from voluntarily making the return of income and other details of its business, as required by the so-called "corporation tax" provisions of the Act of Congress of August 5, 1909, and from paying the tax. She averred in her bill that the law was an invasion of the power of the State of Vermont to grant and preserve the charter of the defendant corporation, that making and publishing the return and paying the tax would be a taking of property without due process of law, and a taking of private property without just compensation, that the law violates the right of the defendant corporation to be secure in its papers and effects from unreasonable searches and seizures, that it imposes a direct and unapportioned tax on the franchise of the defendant corporation, and that if the tax is not direct it is not uniform throughout the United States.

She further averred that the defendants in intending voluntarily to comply with the act were intending to commit a breach of trust in disclosing to the chief competitor of the defendant corporation and to the public the private affairs of the defendant corporation and diverting its funds.

The case was one within the jurisdiction of the Circuit Court by virtue of Section 629, Subdivision 4, of the Revised Statutes of the United States, as one arising under a law providing internal revenue. The defendants demurred for want of equity. The Circuit Court sustained the demurrer and dismissed the bill and the complainant, setting forth that in this case the constitutionality of a United States statute was drawn into question, prayed an appeal to this Court, which was duly allowed.

The provisions of the "Corporation Tax Law" which are particularly discussed in this brief follow:

> "SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed * * *."

Subdivision third of the above section requires every corporation subject to the provisions of the law to make and file a return showing the details of its business.

> "SIXTH. When the assessment shall be made, as provided in this section, the returns, together with

any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such."

SPECIFICATION OF ERRORS.

The Court below erred:

FIRST. In sustaining the demurrer of the defendants.

SECOND. In not overruling the demurrer of the defendants.

THIRD. In not holding that the corporation tax law of August, 1909, is unconstitutional for the reason that the corporate franchise granted to the Stone Tracy Company by the State of Vermont is not a legitimate subject of taxation by the general government, and for the further reason that such taxation is a violation of the Tenth Amendment to the Constitution.

FOURTH.—In not holding said law unconstitutional for the reason that it is unequal, unjust and oppressive in that it singles out for taxation from all the men doing business in this country those alone who do their business in a corporate capacity, leaving untaxed their competitors doing business in an individual or a partnership capacity, and that such an unequal law deprives the Stone Tracy Company of its property without due process of law, in violation of the provisions of the Fifth Amendment to the Federal Constitution.

FIFTH. In not holding the said law unconstitutional for the reason that the provision requiring the publicity of the affairs of the Stone Tracy Company after the government has finished with the return and has levied the tax takes from said corporation its property, *i.e.*, its right to the privacy of its affairs, for a public use, without just compensation.

FIRST POINT.

The Corporation Tax Law, so far as it affects the defendant corporation, is unconstitutional because it invades the sovereignty of the State of Vermont.

A.

THE TAX AND THE OTHER BURDENS OF THE CORPORATION TAX LAW FALL UPON THE CORPORATE FRANCHISE OF THE DEFENDANT CORPORATION.

In his message sent to Congress June 16, 1909, the President, suggesting the passage of the corporation tax, said:

> "I therefore recommend an amendment to the tariff bill imposing upon all corporations and joint stock companies for profit, except national banks (otherwise taxed), savings banks, and building and loan associations, an excise tax measured by 2 per cent. on the net income of such corporations. *This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock*" (44 Cong Rec. 3450).

On June 24, prior to the introduction of the corporation tax amendment, Senator Newlands said:

> "If, however, it be held that the suggested tax is, as the President asserts, 'a tax upon the privilege of doing business as an artificial entity,' that is to say, a tax upon the right to be a corporation, it will probably be contended that the corporate franchise is the creation of the state sovereignty; that the power to tax is the power to destroy; and that the Nation has no power, for this reason, to tax the franchise granted by the State?" (44 Cong. Rec. 3821.)

On the following day the corporation tax amendment was introduced in substantially the form that it was finally adopted. It provided:

> "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company * * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to 2 per cent upon the entire net income over and above $5,000 received by it from all sources during such year * * * *." (44 Cong. Rec., 3915.)

The amendment was redrafted and substantially reintroduced on June 29, but the provisions above quoted were not changed by that amendment. (44 Cong. Rec., 4029.)

In attempting to reply to Senator Brandegee's inquiry as to whether the tax was not on the privilege to do business, Senator Carter had this to say:

> "Mr. Carter: Mr. President, the Senator's discussion is very interesting and very instructive. According to my view, the Federal Government does not assume by the passage of this amendment to extend any privilege to any corporation in a State or to deny any right or privilege now enjoyed by a corporation organized by a State. The amendment merely proposes a classification of subjects for taxation. The corporation is not to be assessed for the privilege of doing business, because that privilege can not be denied if the corporation is organized under the laws of a State, if its purposes are legitimate and not in contravention of public policy. *The tax is assessed because certain business is being done in a certain form or method of organization, by incorporation or as joint-stock companies. It is not a license and not a tax on property, but a tax on that method of doing business, and because the business is being done under that legal form.*

"Mr. Brandegee. Does the Senator from Montana claim that where a State charters a corporation the United States Government can definitely impose a tax upon that corporation because it has presumed to exist under the laws of its own State?

"Mr. Carter. Well, Mr. President, unquestionably in the levying of the tax on bank circulation Congress did interpose its hand and levy a tax which operated to extinguish the banks of issue in the States" (44 Cong. Rec., 4090).

Senator Root, in his defense of the measure had placed the corporation tax on the same plane as the tax on the privilege of dealing on boards of exchange and, quoting from the opinion in *Nicol* v. *Ames* (173 U. S., 509), said:

"'* * * It is a tax upon the facility or privilege of doing business in this way.' The objection was made that the tax was one upon a sale of merchandise made in one place, to wit, in the board room, when no tax was imposed upon the sale of the same merchandise in another place, to wit, out of the board room. The Court said: 'That makes no difference. There is a certain facility, a certain privilege, a certain opportunity of doing this business in the way afforded by this company; and the United States can impose a tax upon that.' And supported it" (44 Cong. Rec., 4070).

The next day, when pressed further by Senator Brandegee's questions on this point, Senator Root suggested that he would be "very glad if the Senator from Maryland [Mr. Rayner] might make a part of my answer to the question of the Senator from Connecticut" (44 Cong. Rec., 4090); and Senator Rayner, falling back on Senator Root's own words, explained the meaning of the tax as follows:

"Mr. Rayner: This is a tax upon the privilege and

the business of a corporation and the facilities of a corporation." * * *

"It is a tax on the privilege and facility of a corporation. It is just as the Senator from New York said yesterday. It could not have been stated better.

"Said the Senator from New York:

"It is not the profits that would be subject to the tax, but the privilege or facility of transacting the business through corporation form. It matters not from what source may come the income which is seized upon by the law as a measure for the value of the facility or privilege which is taxed" (44 Cong. Rec., 4094).

We thus have, if it were needed, the admission of leading lawyers of both parties in the Senate that the tax was understood to be a tax on the privilege or franchise of acting in a corporate capacity.

The amendment was agreed to on July 2 (44 Cong. Rec., 4115), exactly one week from the day it had been introduced and, in the particulars quoted above, is the precise wording of the law as finally enacted except that the rate of the tax was reduced to one per centum.

No opportunity for a hearing was given to the corporations by any committee of the Senate or House of Representatives and we assert that no novel revenue measure ever passed through Congress with less scrutiny of its constitutionality. Not a single demonstration of its validity as a franchise tax was made or even attempted by any Senator. Senator Root's paragraph (44 Cong. Rec., p. 4070), skims lightly over the thinnest ice. He mentions *Veazie Bank* v. *Fenno* (8 Wall. 533) and offers no reason. Senator Rayner, misled against his instinct and his better judgment by a hasty reading of the same case,

conceded without argument the vital point (44 Cong. Rec., p. 4097). Senator Brandegee and Senator Overman doubted and again and again pleaded for light and reason (44 Cong. Rec., pp. 4088–94, 4144). No light was shed. No reason was given. Except for Senator Bristow's short speech (44 Cong. Rec., p. 4102), Senator Cummins, alone, vigorously attacked the measure as unconstitutional upon the grounds we now urge (44 Cong. Rec., pp. 4143–4),but his argument was unheeded, unanswered and perhaps unheard. That there was no answer is not remarkable.

We do not apprehend that we can add materially to what has been said by Senators Root and Rayner on the character of the tax. It is true the law contains the words "with respect to the carrying on or doing business," but those words were merely inserted because of their similarity to words contained in Mr. Justice HARLAN'S opinion in the case of *Spreckels Sugar Refining Company* v. *McClain* (192 U. S., 397). We revert once more to the Senate debate:

> "Mr. Brandegee: * * * * I should like to ask the Senator from New York if he understands the words 'with respect to' the transaction of their business to be equivalent to a tax imposed upon their right or privilege to transact business?
>
> "Mr. Root: I say I think the words 'with respect to the carrying on or doing business by such corporation' do include the meaning of the words used by the Senator from Connecticut.
>
> "Mr. Brandegee: I should like to ask the Senator also if they include anything else?
>
> "Mr. Root: I am not prepared to say on the moment whether something more may not be found in them. I am quite sure they do not and can not include anything more than the very relation between

> the tax and the carrying on or doing of the business which the Supreme Court has declared to be lawful as a method of taxation under the Constitution, because these words are the words which the Supreme Court itself uses in declaring a tax to be lawful" (44 Cong. Rec. 4088).

Since individuals or co-partnerships, though carrying on the same character of business as corporations, are exempt from the operation of the law we see that corporations are taxed not on account of the character of their business but on account of their being corporations and acting in a corporate capacity. To illustrate: The defendant corporation carries on a general retail mercantile business and is subject to all the burdens of this law, while the co-partnership of Dwight Tuxbury & Sons, carrying on the same kind of business, employing the same amount of capital and in the building adjoining that of the defendant corporation, is wholly exempt. The sole distinction between these two concerns is that one has a corporate charter and franchise from Vermont and does its business by virtue thereof in a corporate capacity while the other is a co-partnership.

The burdens of this law, therefore, fall on the defendant corporation because it has a corporate charter and because it acts in a corporate capacity.

For persons to be a corporation and for persons to act in a corporate capacity are one and the same thing and this thing is a corporate franchise. We take this as established beyond dispute from the language of Mr. Justice FIELD in *Home Insurance Co.* v. *New York,* 134 U. S., 594 (1890), where, in speaking of the New York

tax on the "corporate franchise or business" of a corporation, he said at p. 599:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do a business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy."

But in addition to the franchise to be a corporation and to act in a corporate capacity there is, in every corporation, the so-called franchise to do the particular business for which it was incorporated. The distinction between these two franchises is quite clearly drawn by Mr. Justice Curtis in *Hall* v. *Sullivan Railroad Co.*, 11 Fed. Cas., 257 (1857), where he points out that among the franchises of a railroad company are, first, that of being a body politic with rights of succession of members and of acquiring, holding and conveying property and suing and being sued by a certain name, and, second, to build, own and manage a railroad and take tolls thereon. That de-

cision was quoted by this Court in *Memphis Railroad Co.* v. *Commissioners,* 112 U. S., 609 (1884), and in the latter case Mr. Justice MATTHEWS said at page 619:

> "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

And while the franchise to do, as distinguished from the franchise to be, does not include things which may not naturally be done by individuals, the right of the corporation to do is, nevertheless, limited and defined by the terms of its charter. On this point this Court said by Mr. Justice FIELD in *Horn Silver Mining Co.* v. *New York,* 143 U. S., 305, 312 (1892):

> "A corporation being the mere creature of the legislature, its rights, privileges and powers are dependent solely upon the terms of its charter."

Thus, while the members of a corporation could, prior

to their incorporation, do the things which after incorporation they do in a corporate capacity, they are limited as a corporation to doing such things or business as their charter provides.

The persons who received from the State of Vermont the charter of the defendant corporation had previously done, as individuals and a co-parnership, those things which they now do in a corporate capacity. But it is not those things that the corporation tax law touches. Were it so, the firm of Dwight Tuxbury & Sons would be within the law. The law, therefore, does not touch those natural rights which, though specified in the charter and which by virtue of permissive language in the charter are sometimes termed a franchise or a secondary franchise, but it touches merely the real or primary franchise of being a corporation and acting in a corporate capacity which could be owned by the incorporators only by virtue of the charter from the State of Vermont.

The burdens of this law, therefore, falling on the defendant corporation because it has a corporate charter and because it acts in a corporate capacity are, with equal certainty, burdens upon the right to be a corporation and to act as such. This is because the Court always looks through the form to the substance and effect of the tax. We quote on this point both from the opinion of this Court and from one of the dissenting opinions in *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429 (1894). In this case Chief Justice FULLER said at page 581:

> "It is the substance and not the form which controls as has indeed been established by re-

peated decisions of this court. Thus in *Brown* v. *Maryland*, 12 Wheat., 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confinedto a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston*, 2 Pet., 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in the case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in *Dobbins* v. *Commissioners*, 16 Pet., 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California*, 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 Wall., 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, 97 U. S., 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S., 326, and *Leloup* v. *Mobile*, 127 U. S., 640, it was held that a tax on income received from interstate commerce was a tax upon commerce itself, and therefore unauthorized."

In the same case (158 U. S., 601), Mr. Justice BROWN said at page 691:

> "Thus in *Brown* v. *Maryland*, 12 Wheat., 419, a license tax upon an importer was held to be invalid as a tax upon imports; in *Weston* v. *Charleston*, 2 Pet., 449, a tax upon stock for loans to the United States was held invalid as a tax upon the functions of the government; in *Dobbins* v. *Commissioners*, 16 Pet., 435, a state tax on the salary of an office invalid, as a tax upon the office itself; in the *Passenger Cars*, 7 How., 283, a tax upon alien passengers arriving in ports of the state was held void as a tax upon commerce; in *Almy* v. *California*, 24 How., 169, a stamp tax upon bills of lading was held to be a tax upon exports; in *Crandall* v. *Nevada*, 6 Wall., 35, a tax upon railroads and stage companies for every passenger carried out of the state was held to be a tax on the passenger for the privilege of passing through the state; in *Pickard* v. *Pullman Southern Car Co.*, 117 U. S., 34, a tax upon Pullman cars running between different states was held to be bad, a tax upon interstate commerce; and in *Leloup* v. *Mobile*, 127 U. S., 640, a similar ruling was made with regard to a license tax for telegraph companies; and finally, in *Cook* v. *Pennsylvania*, 97 U. S., 566, a tax upon the sales of goods was held to be a tax upon the goods themselves. Indeed, cases to the same effect are almost innumerable."

We think there can be no doubt that a court which has decided that an income tax assessed against persons in respect to the interest from their holdings in municipal bonds is an unconstitutional invasion of the sovereignty of a State because affecting its power to borrow will also decide that a tax levied solely on corporations is a burden on the franchises of corporations. It must be borne in mind, moreover, that the tax of one per cent. of income over $5,000 is but one of the burdens imposed upon the defendant corporation by this extraordinary law.

The burdens of the corporation tax upon the franchise of the defendant corporation are not to be likened to those taxes which States impose on corporate franchises of their own creation or on the privilege accorded to foreign corporations to do business within those States. The theory of such taxes we explain at length in the second point of this brief.

B.

State Taxation of Federal Instrumentalities.

We believe that until the year 1870 no Federal tax had been checked by this Court on the ground that it invaded the sovereignty of a State; but long before that date this Court was called on to declare and did declare that a certain State tax invaded the sovereignty of the United States. The case to which we refer is *McCulloch* v. *Maryland,* 4 Wheaton, 316, decided in 1819, and it is, as we think, the first case in which any tax, State or Federal, was declared in part unconstitutional for invading the sovereignty of the United States or one of the States. That case, while not involving a corporation tax and, therefore, not apposite in its facts to the case now before the Court, nevertheless furnishes the groundwork for the principle on which we rely. In that case the legislature of the State of Maryland on February 11, 1818, had enacted a statute providing, in part, as follows:

> "*Be it enacted by the General Assembly of Maryland,* That if any Bank has established, or shall without authority from the State first had and obtained, establish any branch, office of discount and deposit or office of pay and receipt, in any part of

this State, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt, to issue notes in any manner, of any other denominations than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note upon a stamp of twenty cents; every twenty dollar note upon a stamp of thirty cents; every fifty dollar note upon a stamp of fifty cents; every one hundred dollar note upon a stamp of one dollar; every five hundred dollar note upon a stamp of ten dollars; and every thousand dollar note upon a stamp of twenty dollars; which paper shall be furnished by the Treasurer of the Western Shore, under the direction of the Governor and Council, to be paid for upon delivery; *Provided always,* that any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the Treasurer of the Western Shore, for the use of the State, the sum of fifteen thousand dollars."

It will be perceived that this Maryland tax was not a tax on corporations, as such, or on corporate franchises. It applied to all banks and branches of banks, whether corporations, partnerships or individual bankers, carrying on the business of banking within the State of Maryland without having received permission from the State. It was, therefore, a tax on the doing of a banking business to the extent that such business involved the issuing of notes.

There was then in existence the Bank of the United States, chartered by an Act of Congress, and having a branch in the State of Maryland. The Bank of the

United States contested the question of its liability to this tax and brought the case to this Court. Before this Court the argument of Mr. Webster, Mr. Pinkney and the Attorney General of the United States in behalf of the bank, the argument of Mr. Hopkins, Mr. Jones and the Attorney General of Maryland in behalf of the State of Maryland and the opinion of this Court by the Chief Justice dwelt on two main points: first, the power of the United States to incorporate the bank and, second, the power of the State of Maryland to impose the tax on the bank. It is the second point which particularly touches the case at bar.

The Supreme Court held that Congress, for the convenient exercise of the constitutional powers of the Government, might charter a bank and that such bank, being an instrumentality of government, could not be taxed in respect to its operations by one of the States. The substance of the decision is best summarized by Chief Justice MARSHALL himself, in his later opinion in *Osborn* v. *United States Bank*, 9 Wheaton 738, where he said in speaking of the earlier case at page 859:

> "The foundation of the argument in favor of the right of a state to tax the bank, is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its

being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true; the bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. The whole opinion of the court, in the case of *McCulloch* vs. *State of Maryland*, 4 W. 316, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' "

Returning to the report of the case of *McCulloch* v. *Maryland*, we quote from the opinion of the Court. Chief Justice MARSHALL said:

"That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied." (Page 425.)

"On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations." (Page 426.)

"The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body

by the people of the United States? We think it demonstrable, that it does not." * * * "If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states and safe for the Union." (Page 429.)

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*." (Page 431.)

"If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government." (Page 432.)

"* * * the power of taxation in the general and state governments is acknowledged to be concurrent." (Page 435.)

From these quotations we draw the principle of our argument: that a State tax so far as it invades the constitutional powers and sovereignty of the United States is void and that a Federal tax so far as it invades the reserved powers and sovereignty of the States is equally void. It is quite independent of and perfectly consistent with the rule of supremacy of Federal laws made within the constitutional scope of the general Government.

It has been intimated that the opinion in *McCulloch* v. *Maryland* furnishes, in the quotation which follows, a ground of distinction between the Maryland tax on the United States Bank and the corporation tax on State corporations. The opinion says at pages 435-6:

> "It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constitutents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always

> exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole; between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

But immediately thereafter the opinion says:

> "But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States."

But both of these last quotations must be read in the light of the case then before the Court. The Maryland tax, as we have pointed out, was not a corporation tax. It was not a franchise tax. It was a tax on the business of banking. Hence the tax, if permitted to be levied on the business of the United States Bank, would have been a burden on an agency of the Federal Government and a burden on the Government's constitutional powers exercised through constitutional means. The State banks, as Mr. Pinkney pointed out (p. 398), were not fiscal agencies of the States creating them and of course could be taxed by the United States by a general tax on the banking business. Moreover, the Court was dealing with a case where total exemption from all State taxation on the business of the bank could properly be claimed. We are claiming no such exemption. The business of the defendant corporation in the case at bar is a purely private business like that described in the quotation from *Osborn* v. *U. S. Bank* (*supra*), and can be taxed by any Federal excise law which affects all persons and corporations doing a mercantile business and which is, therefore, not a fran-

chise tax. But the Court never meant to suggest that a Federal tax on banks, falling solely on those which had been incorporated, could be sustained under the general power to tax. Such a tax would not have been "*safe for the States, and safe for the Union*," because it would have invaded the power of the States—not in respect to an instrumentality or agency of government but in respect to a high prerogative of State sovereignty, to grant corporate charters. The Judge who said that a State could not tax a patent granted by the United States could not have believed that the United States could tax a charter granted by a State. The Judge who said twice in the same opinion that the taxing powers of the States and the United States were concurrent (pp. 425, 435) would not have decided that a State franchise could be taxed by Congress while a United States patent could not be taxed by a State.

Although the illustration of the operation of the whole upon the part as distinguished from the operation of the part upon the whole, caught from Mr. Pinkney's argument (p. 398), bears first blush plausibility as a sketch of our duality of sovereignty, it has not controlled this Court in a single case that we have been able to find where the suggestion has been made that while the States may not burden by tax the constitutional powers of the United States the Federal Government is free to tax the reserved powers of the States. The learned Justice who made the suggestion in *The Collector* v. *Day*, 11 Wallace, 113 at p. 128, was in a minority of one. It was repudiated by the majority opinion in that case and we have not seen it since in any reported case except one other dissenting

opinion by the same Justice. If it were controlling, the line of decisions declaring the public securities of the States and their municipalities to be beyond the reach of Federal taxation would never have been made.

The case of *Osborn* v. *United States Bank*, 9 Wheaton, 738 (1824), we have already alluded to. It involved the right of the State of Ohio to tax the Bank of the United States for operating in that State. The case follows *McCulloch* v. *Maryland* and decided that the bank was not subject to a tax under the Ohio statute of February 8, 1819, which provided specifically that if the Bank of the United States or any other should continue to transact business in the State it should be liable to an annual tax of fifty thousand dollars on each office of discount and deposit.

The rule of *McCulloch* v. *Maryland* and *Osborn* v. *United States Bank* was also applied to the institutions chartered under the National Banking Act and protects their business from State taxation except so far as their shares may be taxed in the hands of their stockholders by express consent of Congress.

The first case of conflict of power between a State and the United States with respect to taxing public securities arose in *Weston* v. *The City Council of Charleston*, 2 Peters, 449 (1829), when a municipal ordinance of Charleston, South Carolina, provided an income tax on "all personal estate, consisting of bonds, notes, insurance stock, *six* and *seven per cent. stock of the United States* * * *, twenty-five cents upon every hundred dollars." This Court held that such a tax on the Government stock

was void as a burden on the Government's power to borrow.

Chief Justice MARSHALL, referring to *McCulloch* v. *Maryland,* said at page 468:

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government; to any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

The tax was held unconstitutional.

A case similar to the last came to this Court from New York, where the City of New York had included in an assessment against the capital of the Bank of Commerce its holdings of Government bonds. That was the case of *Bank of Commerce* v. *New York City,* 2 Black, 620 (1862). The decision, following the *Weston case,* held the assessment void, and the opinion by Mr. Justice NELSON, speaking for the entire Court, is so clear in the enunciation of a principle that is vital in the case at bar that we quote from it at some length:

> "The result of this doctrine is, that the exercise of any authority by a State Government trenching upon any of the powers granted to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power." (Page 633.)

• • • • •

"The conclusive answer to the attempted exercise of the State authority in all these cases is, that the exercise is in derogation of the powers granted to the General Government, within which, it is admitted, it is supreme. That Government whose powers, executive, legislative or judicial, whether it is a Government of enumerated powers like this one, or not, are subject to the control of another distinct Government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the Government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the General Government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another Government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of that Government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other Government, 'it is a right which in its nature acknowledges no limits.' And the principle is equally true in respect to every other power or function of a Government subject to the control of another." (Pages 633-4.)

After quoting from Chief Justice MARSHALL'S rule which is "safe for the States and safe for the Union" Mr. Justice NELSON thus concludes on page 635:

"Each is sovereign and independent in its sphere of action and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

In the case of *Dobbins* v. *The Commissioners of Erie County*, 16 Peters, 435 (1842), it appears by the agreed statement of facts that Captain Daniel Dobbins of the United States revenue cutter Erie had been assessed by the commissioners of Erie, Pennsylvania, for county taxes upon his office as commander of the cutter for the years 1835 to 1837 in the sum of ten dollars and seventy-five cents. It was argued in this Court that the assessment was invalid since it was on an office of the Government. This Court, by Mr. Justice WAYNE, held the assessment void on the authority of *McCulloch* v. *Maryland* and *Weston* v. *City Council of Charleston* (both of which we have referred to), as a State tax on the constitutional means employed by the Government of the United States to execute its constitutional powers.

C.

FEDERAL TAXATION OF STATE INSTRUMENTALITIES.

Up to this point we have mentioned no case in which the taxing power of the United States has been checked for trenching upon the sovereignty of a State and although no such case seems to have come before this Court prior to 1870, expressions frequently appeared in the opinions of the Court which naturally led up to the conclusion that an invasion of State sovereignty through Federal taxation must be checked for precisely the same reason that invasion of the United States sovereignty through State taxation must be checked. Some of these expressions follow:

In *Worcester* v. *Georgia*, 6 Peters, 515 (1832) Mr. Justice McLean, said at page 570:

> "The powers exclusively given to the Federal Government are limitations upon the State authorities. But, with the exception of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the General Government, than the action of the State Governments can arrest or obstruct the course of National power."

In *Ableman* v. *Booth*, 21 Howard, 506 (1858), Chief Justice Taney, speaking for the entire Court, said at page 516:

> "The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." * * *
>
> " 'this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State.' The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution." (Page 519.)

In the *License Tax Cases*, 5 Wallace, 462 (1866), Chief Justice Chase, speaking for the entire Court, said at page 470:

> "But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress

> has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject."

In *Pervear* v. *The Commonwealth,* 5 Wallace, 475 (1866), Chief Justice CHASE, speaking for the entire Court, said at page 479:

> "But the defence set up in the case before us is a very different one. * * * * It is founded on the general power to levy and collect taxes, *admitted on all hands to be concurrent only with the same general power in the State governments;* * * *."

In the year 1870, the case of *The Collector* v. *Day,* 11 Wallace, 113, came before this Court presenting practically the converse of the case of *Dobbins* v. *Commissioners of Erie County* (*supra*). The facts were as follows:

For the years 1866 and 1867 Joseph M. Day, Probate Judge for Barnstable County, Massachusetts, was assessed for the Federal income tax upon his salary as such judge. He paid under protest the tax for those two years, amounting to $61.50, and brought suit against the Collector of Internal Revenue to recover back the same. The case was argued on an agreed statement of facts in the Circuit Court of the United States for the District of Massachusetts, at October term, 1869, before Mr. Justice CLIFFORD and Judge JOHN LOWELL.

The question before the Circuit Court in Massachusetts was whether the principle of the cases heretofore cited in this brief applied to Federal taxation.

From the opinion of Mr. Justice CLIFFORD (reported in 3 Clifford, 376), we discover how he disposed of the argument in favor of the right of the United States to tax the salary of the State judge and applied the principles of *McCulloch* v. *Maryland*. He said at page 388:

> "Federal officers and the instruments and means of the Federal government, it is conceded, are exempt from State taxation, but it is denied that the Federal government is subject to any such implied prohibition, even in the case before the Court, because the tax in question, it is argued, is imposed by the same people who established the offices and institutions in the States which are subjected to the burden of the controverted tax. Suppose the tax in question is imposed in the constitutional sense by the same power as that which created the offices and institutions subjected to the payment of the same, still it is not perceived that the concession advances the argument, unless it be assumed that the offices and institutions subjected to the burden imposed are under the control of the power imposing the tax, which is the precise question in controversy between the parties."
>
> "The proposition of the defendant is in substance and effect that the States cannot tax the instruments and means of the government of the United States, because the Federal government is supreme, but that the latter may tax the instruments and means of the State governments, because, as he assumes, the States are subordinate to the United States in the same unqualified sense as the counties of a State are to the paramount authority by which they were created. Unquestionably the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, because it is so ordained in the Constitution, but the same instrument also provides that the powers not delegated to the United States by the Constitution,

nor prohibited by it to the States, are reserved to the States respectively or to the people, and it is an obvious rule of construction that these two provisions must be considered together in determining the question under consideration, as they are important provisions in the same instrument, and cannot be regarded as in any respect repugnant to each other." (Page 389.)

"Power to tax for State purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in Congress. Both are subject to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other. *Fifield* v. *Close*, 15 Mich., 505; *Warren* v. *Paul*, 22 Ind., 279; *Jones* v. *Keep*, 19 Wis., 369; *Union Bank* v. *Hill*, 3 Cald. (Tenn.), 325.

"Most of the powers conferred upon the government of the United States are exclusive, and it is unquestionably true that the national government in the exercise of those powers is supreme, but it is equally true that powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people, and it follows that the States in the exercise of such powers as are not delegated to the United States and are reserved to them are also supreme. Exclusive powers possessed by the United States cannot be exercised by the States, nor can the exclusive powers possessed by the States be exercised by the Federal government. They are in those respects, though exercising jurisdiction within the same territorial limits, 'separate and distinct sovereignties, acting separately and independently of each other within their respective spheres,' just as fully 'as if the line of division was traced by landmarks and monuments visible to the eye.' *Ableman* v. *Booth*, 21 How., 516; *McCulloch* v. *Maryland*, 4

Wheat., 429; *Austin* v. *The Aldermen*, 7 Wall., 699.

"Pursuant to the Constitution, Congress may lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; and the States, subject to the prohibitions of the Constitution, express and implied, may lay and collect taxes and excises for the support of their respective State governments, and each in that behalf is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised. Unless it be so, then the States have only a permissive existence, as it is conceded that the power to tax involves the power to destroy, and that the power to destroy may defeat and render useless the power to create." (Pages 393-4.)

The case came before this Court on the appeal of the Collector of Internal Revenue, at December term, 1870, and was argued by the Attorney General of the United States on behalf of the appellant. (11 Wallace, 113.)

The opinion of this Court by Mr. Justice NELSON, after asserting that the rule of *McCulloch* v. *Maryland* and *Dobbins* v. *The Commissioners of Erie* must apply, says at page 124:

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or, to the people.' The government of the United States, therefore, can claim no powers

which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States.

"The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County* v. *Oregon* (7 Wall. 76). 'Both the States and the United States,' he observed, 'existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved.' Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

"Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our

> complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws."
>
> "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, * * * *." (Page 126.)

The case of *The Collector* v. *Day*, remains the law and fully sustains the principle which we stated in the first part of this brief, viz: that a State tax, so far as it invades the constitutional powers and sovereignty of the United States, is void and that a Federal tax, so far as it invades the reserved powers and sovereignty of the States is equally void.

The principle is stated in *Railroad Company* v. *Peniston*, 18 Wallace, 5 (1873), in the following language at page 30:

> "There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of

the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National Government is legitimately exercised within the States. While it is true *that* government cannot exercise its powers of taxation so as to destroy the State Governments, *or embarrass their lawful action*, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government."

This principle was applied in the case of *United States* v. *Railroad Company*, 17 Wallace, 322 (1872). In that case it appeared that the city of Baltimore in the year 1854 had loaned to the Baltimore and Ohio Railroad Company $4,500,000 to aid in the construction of the railroad. By section 122 of the Internal Revenue Act of 1864, as amended in 1866, it was provided that railroads (and various other companies) should pay out of earnings five per cent. on interest or coupons, dividends, etc. Under this law the United States demanded five per cent. out of the interest payable to the City of Baltimore on its loan. This Court, affirming the decision of the Court below, held that this tax could not lawfully be imposed on the City of Baltimore. By Mr. Justice HUNT the Court said at page 327:

"The creditor here is the city of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.

"There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right

> of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Goverment from its organization. This carries with it an exemption of those agencies and instruments. from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed. if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other."

The principle has also been applied to exempt municipal bonds from Federal taxation. In *Mercantile Bank* v. *New York*, 121 U. S., 138 (1886), Mr. Justice MATTHEWS said at page 162:

> "Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, * * *."

The same principle made the income of municipal bonds free from the income tax of 1894.

> *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S., 429 (1895), at pages 583–586, 601–603, 652, 653–4.

And in the case of *Plummer* v. *Coler*, 178 U. S., 115, (1900), these last cases are cited and quoted in such manner as to show beyond all doubt that this Court now regards as completely reciprocal this restraint upon the general Government and the States. In that case Mr. Justice SHIRAS said at page 117:

> "It is not open to question that a State cannot, in the exercise of the power of taxation, tax obliga-

tions of the United States. *Weston* vs. *Charleston*, 2 Pet., 449; *Bank of Commerce* vs. *New York City*, 2 Black, 620; *Home Insurance Co.* vs. *New York*, 134 U. S., 594, 598.

"So, likewise, it is settled law that bonds issued by a State, or under its authority by its public municipal bodies, are not taxable by the United States. *Mercantile Bank* vs. *New York*, 121 U. S., 138; *Pollock* vs. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 583.

"The reasoning upon which these two lines of decision proceed is the same, namely, as was said by Mr. Justice Nelson in *Collector* vs. *Day*, 11 Wall., 113, 124: 'The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States;' and, as was said by Mr. Chief Justice Fuller, in *Pollock* vs. *Farmers' Loan & Trust Company*, 157 U. S., 537: 'As the States cannot tax the powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.'"

D.

Other Cases of Invasion of Sovereignty Through Taxation.

Lands owned by the United States are exempt from State taxes, as was held by this Court in *Van Brocklin* v. *Tennessee*, 117 U. S., 151 (1886). And in *Ambrosini* v. *United States*, 187 U. S., 1 (1902), it was held that

the stamp tax required by the War Revenue Act of the United States of 1898 could not be imposed upon a bond required by the State of Illinois as a condition to the granting of a license to sell intoxicating liquors. In that case this Court, speaking by Chief Justice FULLER, said at page 7:

> "The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assume the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of State and of city, as authorized by the State, to insure the public welfare in the conduct of the business, although the business itself was not governmental."

The opinion in the case last cited refers to a number of decisions as authority, among them *Bettman* v. *Warwick*, 108 Fed. Rep., 46, decided by the United States Circuit Court of Appeals for the Sixth Circuit. In that case it was held that it was not within the power of Congress to require a revenue stamp to be put on a bond given by a notary public as a condition to his appointment to office by a State. The opinion by Mr. Justice LURTON, then Circuit Judge, concurred in by Mr. Justice DAY, then Circuit Judge, and by Judge SEVERENS, completely upholds the mutuality of the restraints upon the taxing powers of the National and State governments against invading the sovereignty of each other.

E.

State Taxation of United States Patents.

We next take up the subject of patents, the right to create and preserve which is vested by the Constitution in the United States. Patents had their origin in royal grants as a part of the prerogative of the crown (1 Robinson on Patents, Sections 1, 10), and before the adoption of the Constitution were and still may be granted by the several States out of their own sovereignty (Chancellor Kent, in *Livingston* v. *Van Ingen*, 9 Johnson, 507 (1812), at pages 528, 530-1). In *McCulloch* v. *Maryland* Chief Justice Marshall, in a part of the opinion already quoted, scouted the idea that a State might tax a patent-right granted by the general Government. He classed it with the mint and the custom house. It has been assumed in later decisions of this Court that a Federal patent-right could not be taxed by a State.

Patterson v. *Kentucky*, 97 U. S., 501 (1878).
Webber v. *Virginia*, 103 U. S., 344 (1880).
Allen v. *Riley*, 203 U. S., 347 (1906).

In other courts the point has been expressly adjudicated.

In re Sheffield, 64 Fed. Rep., 833 (1894).
Commonwealth v. *Westinghouse Mfg. Co.*, 151 Pa. St., 265 (1892).
The People ex rel. Edison Co. v. *Board of Assessors*, 156 N. Y., 417 (1898).

And the decisions are placed, not on the ground that the making of the patented article or the vending of the patented article, or that the patented article itself is a means, instrumentality or agency of the United States,

but on the ground that the article derived its right to be a patented article from a grant or franchise from the United States. A patent is a franchise. The words of Chief Justice TANEY, in delivering the opinion of this Court in *Bloomer* v. *McQuewan*, 14 Howard, 539 (1852), make our meaning clear. He said at page 549:

> "The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a share in the monopoly and that monopoly is derived from, and exercised under, the protection of the United States."

Of course, by the Federal franchise of the letters patent the patentee gets no new right to make or vend the article embodying his invention. That right he has before the patent is applied for or granted. It is his natural right. As this Court, by Mr. Justice HARLAN, said in *Patterson* v. *Kentucky* (*supra*) at page 506:

> "The right to sell the Aurora oil was not derived from the letters patent, but it existed and could have been exercised before they were issued, unless it was prohibited by valid local legislation. All which they primarily secure is the exclusive right in the discovery."

It has therefore always been held that the mere fact that articles had been patented by a United States patent did not prevent the States from including the sale of such articles in their ordinary police or license regulations. That was the decision in the case last cited and also in the case of *Webber* v. *Virginia* (*supra*), and other cases following it.

It has been suggested that taxing a Federal patent differs from taxing a State corporate franchise, because the States granted to the Federal Government the power to issue patents, and therefore may not destroy the value of that grant by taxing the patents, while, on the other hand, the States retained their right to grant corporate franchises but subject to the general power of taxation which they had conferred on the Government. That is a perverted argument. It involves a breach of faith with the States and a violation of the compact under which the union was formed, and amounts to saying that what the States granted to the general Government belongs to the latter by express grant, while what was reserved by the States may be wrested from them by the general Government through the power to tax.

The exemption of Federal patent-rights from State taxation has a very significant bearing on this case. Suppose, for example, that the State of Vermont should enact a law providing that every person, firm or corporation owning any United States letters-patent should pay a tax with respect to the carrying on or doing of any business protected by such letters-patent equivalent to one per cent. of the net income of such business. The State of Vermont would attempt to defend the statute on the ground that the State had the right to classify for purposes of taxation; that it had selected as a class certain favored persons and corporations who enjoyed Government monopolies; that the class so selected was, by reason of their monopolies, well able to pay and that the tax was light. On behalf of the Government it would be answered that the power to grant patents was a constitutional power of the United States;

that a tax upon a Federal patent was a tax upon a franchise granted by the United States out of its sovereignty, and therefore a tax upon a constitutional power of the general government and an invasion of its sovereignty, and that though the tax was light, the power to tax at all, if once admitted, would involve in the assessment of a heavier tax the power to destroy and to render useless the power to create.

There can be little doubt as to how this Court would decide such a case. We think there should be as little doubt if the conditions were reversed and the Court had before it the case of a Federal tax upon a State patent or State corporate franchise.

F.

STATE TAXATION OF A FEDERAL CORPORATE FRANCHISE.

We now pass to another sort of franchise—the franchise to be a corporation and to act in a corporate capacity. Like the franchise of letters-patent, it comes to the citizen or subject as a crown prerogative or a prerogative of sovereignty. "The king has also the prerogative of conferring "privileges upon private persons. * * * Such also is the "prerogative of erecting corporations; whereby a num- "ber of private persons are united and knit together, and "enjoy many liberties, powers and immunities in their "politic capacity which they were utterly incapable of in "their natural." (1 Bl. Com., Ch. 7, pp. 272–3.) "The "king's consent is absolutely necessary to the erec- "tion of any corporation, either impliedly or expressly "given. * * * The methods, by which the king's "consent is expressly given, are either by act of parlia-

"ment or charter." (1 Bl. Com., Ch. 18, 472–3.) "Fran-
"chise and liberty are used as synonymous terms,
"and their definition is, a royal privilege, or branch of
"the king's prerogative, subsisting in the hands of a
"subject. Being therefore derived from the crown, they
"must arise from the king's grant; * * *. The kinds
"of them are various, * * *. It is likewise a fran-
"chise for a number of persons to be incorporated and
"subsist as a body politic; with a power to maintain per-
"petual succession and do other corporate acts: * * *."
(2 Bl. Com., Ch. 3, p. 37.)

"Franchises," said Chief-Justice TANEY in *Bank of Augusta* v. *Earle*, 13 Peters, 519 (1839) at page 595, "are
"special privileges conferred by Government upon individ-
"uals, and which do not belong to the citizens of the coun-
"try, generally, of common right. It is essential to the
"character of a franchise that it should be a grant from
"the sovereign authority, and in this country no franchise
"can be held which is not derived from a law of the
"State."

In view of the settled law that a State might not tax the franchise of letters patent granted by the United States, and in view of the fact that corporate franchises, like patent franchises, are granted out of sovereignty, it was inevitable that this Court should unanimously hold, when the great case of *California* v. *Central Pacific Railroad*, 127 U. S., 1, came before it, that the States were utterly without power to tax a corporate franchise granted by the United States. Defenders of the "corporation tax" have sought to lessen the scope of Mr. Justice BRADLEY'S great opinion in that case by saying that it

turned on the fact that the railroad was a Federal agency and not on the fact that the tax was laid on a Federal franchise. There is no justification for this. There is not a line or a word in the whole opinion that gives color to that statement. The entire decision was placed upon the ground that the franchise "emanates "from, and is a portion of, the government that confers "it. To tax it, is not only derogatory to the dignity, but "subversive of the powers of the government and repug-"nant to its paramount sovereignty." (p. 41:) Justice BRADLEY did mention the public or national utility of the corporation, but the mention of that feature was quite subordinate to the main issue, and beside the real question of the power of the State to tax the franchise. Long before that case came before this Court it had been recognized that every great transcontinental railroad performed Government service in the transportation of mails, troops, etc., and was an instrumentality, to that extent, of the United States, and in establishing the fact that such a railroad was an instrumentality of the United States, it made not the slightest difference whether the railroad was chartered by the United States or one of the States. It would have been, therefore, a sheer waste of time for this Court to have pointed out in *California* v. *Central Pacific Railroad* that the railroad had been chartered by the United States if the Court regarded the railroad as an instrumentality of the United States like the Bank of the United States, the National banks, the Government stocks and the captain of the revenue cutter.

We have said that it was recognized that all transcontinental railroads were carrying troops, mails, etc., and were,

to that extent, instrumentalities of the United States, and that it made no difference as to the power of the State to tax the property of such railroads whether they were incorporated by the United States or by a State. In support of this we quote from the opinion of this Court in *Railroad Company* v. *Peniston*, 18 Wallace, 5. Mr. Justice STRONG said at pages 33, 34:

> "A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad." * * *
>
> "It is, however, insisted that the case of *Thompson* vs. *The Union Pacific Railroad Company* differs from the case we have now in hand in the fact that it was incorporated by the Territorial legislature and the legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from *McCulloch* vs. *The State of Maryland*. But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of National powers. As was said in *Weston* vs. *Charles-*

> *ton*, they cannot, by taxation or otherwise, 'retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a State legislature."

Mr. Justice STRONG, however, was careful to point out that the tax there under consideration was "*not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being.*" The same rule had been followed in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S., 530 (1888), in which Mr. Justice MILLER incidentally pointed out (p.549) that all railroads had been declared to be government post-roads. When, therefore, the case of *California* v. *Central Pacific Railroad*, 127 U. S., 1, came before this Court, it was settled law that property taxes on railroads employed as Federal agencies could be levied by the States irrespective of whether such railroads were chartered by the United States or by the States and the only questions before the Court were whether the State tax in that case was laid on a Federal franchise and, if so, whether it could be lawfully laid. It appeared by Article XIII, section 10 of the constitution of California, that "the franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization * * * *." This language was followed by the legislature of California in framing section 3628 of the Political Code. The Central Pacific Railroad Company claimed that the State Board of Equalization had included

in assessments against the company the value of the franchise or franchises granted to it by the United States and expressly alleged it was a Federal corporation holding its corporate power and franchises under the government of the United States. The Court below found that the assessment did include "the full value of *all* franchises and corporate powers exercised by the defendant."

Mr. Justice BRADLEY, after stating the Acts of Congress which related to the building of the Central Pacific Railroad or its predecessor, found that the Company possessed franchises granted by Congress. He thus disposed of the question whether the State may tax them: (Pages 40-1.)

> "Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise. Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always reduced by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed

or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In vew of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* vs. *Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject."

The foregoing extract from Mr. Justice BRADLEY's opinion was quoted in full and with approval by this Court in the case of *Central Pacific Railroad* v. *California*, 162 U. S., 91 (1896) at pages 184-5, and it would seem to be settled law that a State cannot tax a franchise granted by the General Government.

G.

Federal Taxation of a State Corporate Franchise.

We now pass to the precise question before this Court in the case at bar: May Congress impose a tax on a corporate franchise granted by a State?

We have shown that the granting of charters and franchises to corporations is a prerogative of the crown. Being such, it is owned by the States, as this Court, speaking by Mr. Justice McLean, said in the case of *Wheeler* v. *Smith*, 9 Howard, 55, 78 (1850):

> "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government."

Let us now consider some of the cases which may be cited on the side of the corporation tax. First is the case of *Veazie Bank* v. *Fenno*, 8 Wallace, 533 (1869). A dictum in *Veazie Bank* v. *Fenno* is the only authority referred to in the Senate debates as upholding the novel principle of this extraordinary tax. The decision in that case went upon the ground that to the United States belongs complete control over currency.

The Veazie Bank was a Maine corporation and had authority to issue bank notes for circulation. The Act of Congress of July 13, 1866, provided that

> "Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."

The bank claimed that this law was unconstitutional on two grounds. The second ground was that "the act imposing the tax impairs a franchise granted by the State and Congress has no power to pass any law with that intnt or effect" (Page 540); and the Court says at page 547:

> "Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?
>
> "We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property."

Consider the statute there before the Court. It was not a corporation tax. It was not aimed at corporations or payable by them because they were such. It included among those liable to pay the tax all banks—partnerships as well as incorporated companies (14 Op. A. G. 373)—and it was not levied on the banks or bankers in respect to their business as a whole or their franchise, right or privilege to do business. It was levied on property and affected a single thing that all banks and bankers had been accustomed to do, viz., to issue notes for circu-

lation, whether such notes were the banker's own or those of some other person or bank. This feature was perfectly understood by the Court and was dwelt upon, for Chief Justice CHASE said at page 547:

> "But in the case before us the object of taxation is *not the franchise* of the bank, *but property created, or contracts made and issued under the franchise, or power to issue bills.* A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts."

And on pages 546-7:

> "The tax under consideration is a tax on bank circulation."

The dissenting Justices, Mr. Justice NELSON and Mr. Justice DAVIS considered that this tax upon bank circulation was equivalent to a tax on the reserved power of the States to create banks and therefore unconstitutional, and Mr. Justice NELSON said at page 555:

> "As we have seen, in the forepart of this opinion, the power to incorporate banks was not surrendered to the Federal Government but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them."

And on page 556:

> "It is true, that the present decision strikes only at the power to create banks, but no person can fail to see that the principle involved affects the power to create any other description of corporation, such as railroads, turnpikes, manufacturing companies, and others.
>
> "This taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the government, or in the opinions of the illustrious statesmen who founded it. These statesmen scrupulously abstained from any encroachment upon the reserved rights of the States; and, within these limits, sustained and supported them as sovereign States."

These quotations, involving principles which we now urge, were not, we submit, denied by the majority of the Court in *Veazie Bank* v. *Fenno*. The majority opinion expressly states that the tax was not on the franchise of the bank and admits that there may be cases in which a tax on a franchise granted by a State must be held unconstitutional, and that the reserved power of the States to pass laws *and to give effect to them through executive action* is beyond the reach of Federal taxation. That concession comes very nearly covering, if not quite covering, the case at bar. Surely the assertion that the Court cannot admit "that franchises granted by a State are necessarily exempt from taxation" does not necessarily include the franchise to erect a corporation through the exercise of a crown prerogative. It may well be that such a franchise as the right of an individual or a firm or

corporation to issue circulating notes as currency may not be exempt from Federal taxation any more than the right to buy and sell on the floor of an exchange or the right to transmit an estate by will or to take title under a will; but when the Court expressly states that the tax is not upon the franchise of the bank, i. e. the franchise to be a corporation and to act in a corporate capacity, we insist that no legitimate use of the case can be made as a precedent for the validity of the corporation tax of 1909.

The latter part of the opinion of the Court in *Veazie Bank* v. *Fenno* shows that the statute there under discussion may be sustained on the strength of the Government's power to regulate currency. That this is probably regarded as the true ground of the decision may be gathered from the opinion of this Court in the *Head Money Cases*, 112 U. S. 580 (1884), where Mr. Justice MILLER, speaking for the entire Court, said at page 596:

> "In the case of *Veazie Bank* v. *Fenno*, 8 Wall., 533, 549, the enormous tax of eight per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

So far as we have been able to ascertain, the case of *Veazie Bank* v. *Fenno* has never been referred to by this Court as sustaining the power of the United States to tax a State franchise to be a corporation.

It has been suggested that section 122 of the Internal Revenue Act of 1864, as amended in 1866, affords a precedent for the corporation tax of 1909 and the decision of *Railroad Company* v. *Collector*, 100 U. S. 595 (1879) is referred to as sustaining the tax which was to be paid by "any railroad, canal, turnpike, canal navigation or slack water company." It is true that individuals and partnerships were not mentioned by name in that section, but it is also the fact that the word "corporation" is not used. The Court seemed to think the tax an ordinary occupation tax on particular businesses.

The case of *Railroad Company* v. *The Collector*, is not a precedent for the corporation tax of 1909. The statute there in question (Section 122 of the Internal Revenue Act of 1864, as amended in 1866) provided that the companies named must deduct from the payment on account of interest on bonds and of dividends on stock a tax on such interest and dividends, and the single question presented to this Court was whether this tax could be collected when the bondholders and stockholders were aliens. None of the constitutional questions arising in the case at bar were mentioned or even suspected of being involved in *Railroad Company* v. *The Collector*. That the case is of no value in the present discussion appears from the first paragraph of the opinion where Mr. Justice MILLER says at p. 596:

> "As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, *the case is of little consequence as regards any principle involved in it as a rule of future action.*"

It is also important to notice that this Court in the case of *United States* v. *Railroad Company*, 17 Wall., 322, held

that the tax imposed by the law under consideration in *Railroad Company* v. *The Collector*, 100 U. S., 595, was not a tax upon the corporation. In the headnote of the case it is said that:

> "The tax provided for in the 122nd Section of the Internal Revenue Act of June 30th, 1864, as subsequently amended * * * is a tax upon the creditor and not upon the corporation. The corporation is made use of, but as a convenient means, of collecting the tax."

It is not clear whether the construction of this statute of 1864 entertained by this Court in the case in Wallace is to prevail or the subsequent construction in the case decided in 100 U. S., but it is interesting to note that the subsequent case of *Railroad Company* v. *The Collector*, 100 U. S., 595, makes no mention in the opinion of the prior case of *United States* v. *Railroad Company*, 17 Wall., 322.

Another case which has been thought pertinent by supporters of the corporation tax is *Nicol* v. *Ames*, 173 U. S. 509 (1899), where this Court upheld that provision of the War Revenue Act of 1898 requiring a memorandum of every sale at any exchange or board of trade or other similar place and the affixing of a revenue stamp to such memorandum. The Court, after holding that such tax was not a direct tax, held that sales of that sort could be classified by themselves and apart from other sales and could therefore properly be selected for a special tax because of the obvious and peculiar privilege and facility of making a sale at a place where there was the best opportunity for a demand, a price, and dispatch in the transaction of business. It was conceded, however, that the

privileges and facilities of exchanges were not created by the State, and, therefore, were not, in any sense, franchises created out of a crown prerogative. And in the opinion of the Court in *Nicol* v. *Ames*, Mr. Justice PECKHAM suggestively said at page 521:

> "If it were to be assumed that taxes upon *corporate* franchises or privileges may be imposed only by the authority that created them, it does not follow that *no* privilege or facility can be taxed which is not created by the government of a State or by Congress."

We may therefore dismiss *Nicol* v. *Ames* as an authority in support of the corporation tax.

We shall next proceed to discuss the acknowledged power of Congress to tax the transmission of property under the State laws of wills and intestacy. The recognition of this power has been referred to as an argument to support a Federal tax on corporate franchises. The error arises from a failure to distinguish between the origin, ownership, transmission and receipt of property, on the one hand, and the creation of a corporation on the other.

Blackstone's chapter "of Property in General" (2 Bl. Com. Ch. I, p. 1) gives the origin of property. In the beginning all things were in common and the only property which an individual had therein was a kind of a transient property which, while he used the particular thing, was his by "the law of nature and reason." (*Id.*, p. 3.) When he left it, the thing became transiently the property of the next taker. "As mankind increased in numbers, craft and ambition it became necessary, in order to avoid innumerable tumults, to entertain the concep-

tion of more permanent dominion over things." (*Id.*, p. 4.)

> "And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant: which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein." (*Id.*, p. 5.)

> "And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property to the *substance* of the earth itself; which excludes every one else but the owner from the use of it." (*Id.*, p. 8.)

> "Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; * * * " (*Id.*, p. 9.)

Then mutual convenience introduced commercial traffic and transfer of property.

On the death of a person his property became that of the next immediate occupant, but for the peace of mankind "the universal law of almost every nation" has given to the dying person the right of disposing of his property by will, or, in case he makes no will, has declared who shall be his heir or successor (*Id.*, p. 10).

The right of children to inherit seems to have been

recognized earlier than the right to make a will (*Id.*, p. 11), and the origin of their right to inherit seems probably to have arisen from their being naturally the persons who would be near their father's death-bed and therefore the next immediate occupants of his possessions (*Id.*, 11–12). In default of children a man's servants born under his roof become his heirs (*Id.*, p. 12). But the strict rule of inheritance made heirs disobedient and headstrong, defrauded creditors and sometimes prevented the wisest provision for the support of children. This caused the introduction of wills (*Id.*, p. 12).

In *United States* v. *Perkins*, 163 U. S., 625 (1876), this Court, by Mr. Justice BROWN, said at page 628:

> "* * * the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, * * *."

And in *Windham* v. *Chetwynd*, 1 Burr., 414 (1757), LORD MANSFIELD said at page 419:

> "Let me observe that the power of devising ought to be favored.
>
> "It is a natural consequence of property, and the right a man has over his own."

The foregoing citations are sufficient to show that property does not proceed from a sovereign power, nor is it created out of a crown prerogative. It is enjoyed by persons as a natural right. The rights of disposing of it by will and inheriting it are also spoken of as natural rights, though provided for and regulated by laws just as are the owning, sale and purchase of property. The State may say that the provisions of a man's will shall be respected and the State may say who are the heirs, but the State

does not create the property which is transmitted. The transmission is occasioned by death and is not created by the State. The transmission would have occurred without any laws for wills or inheritances and the property would have gone by the old doctrine of occupancy to the first takers. There has never been any theory that upon a man's death his property dissolves, is absorbed by sovereignty and is re-created by sovereignty and vested in somebody else.

If it were maintained that the transmission of a decedent's property was beyond the reach of Federal taxes because regulated by State laws it would follow that property generally, since it is regulated in its ownership, use, sale, exchange and purchase by State laws, must also be beyond the reach of such taxes. This was the view taken by this Court in *Knowlton* v. *Moore*, 178 U. S. 41 (1900), and the subject was thus disposed of by Mr. Justice WHITE at page 59:

> "But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and

also excludes the National government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus, imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates is own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate."

It is therefore held that the transmission of property through the death of its former owner, like the owning, buying and selling of property, is alike within the taxing power of the United States though within State regulation. It brings the transmission of a decedent's property to the same basis as the circulation of negotiable notes as currency, the selling of property, the trafficking in

commodities at exchanges and boards of trade and all other privileges or rights which, though exercised under the permission and regulation of the States, may still be taxable by the United States. There is a perfectly clear distinction between a Federal tax on the doing of a thing with or in respect to property which the State did not create and a Federal tax on a corporate franchise created and granted out of State sovereignty.

In *Thomas* v. *United States*, 192 U. S., 363 (1904) the plaintiff in error had been indicted for omitting to stamp a memorandum of sale of some railroad stock as required by the War Revenue Act of 1898. He was convicted and appealed to this Court. The argument in this Court and the decision turned solely upon the question whether the requirement of affixing to the memorandum a revenue stamp imposed a "direct tax." This Court held that the tax was not a direct tax but an excise tax upon the sale, and the Court by the Chief Justice said at page 371:

> "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates."

The case is, therefore, brought within the principle of the other cases where taxes have been imposed on the opportunity or privilege of doing some particular thing with or in respect to property such as issuing negotiable notes as currency, selling at exchanges or boards of trade, transmitting by will or through intestacy, etc. It was not argued and could not have been argued that the tax was a tax on a corporate franchise and the tax was not even limited to shares in corporations but included shares in "any

association, company or corporation." Therefore every enterprise or property where separate interests were represented by shares was affected alike.

There is nothing in the case of *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397 (1904), which supports the constitutionality of the corporation tax. That case arose under section 27 of the War Revenue Act of 1898, which provided "that *every person, firm, corporation or company* carrying on or doing the business of * * * * refining sugar" should pay an annual excise tax equivalent to a certain per cent. of the gross receipts. The tax was an ordinary occupation tax and the statute imposing it named the occupations taxed and imposed the tax on all persons engaged in such occupations. It was argued that the tax was a direct tax on income. This Court held it to be an excise tax on a particular business and quite in line with *Pacific Insurance Co.* v. *Soule*, 7 Wallace, 433. The corporation tax law lays no tax on any particular business except insurance.

In *South Carolina* v. *United States*, 199 U. S., 437 (1905), it was held that the State dispensaries of South Carolina, although established by the laws of that State and authorized by the State as the sole dispensers of intoxicating liquors, must pay the internal revenue taxes imposed by the United States on liquor dealers. While not referred to in the opinion of the Court, the case of *Bank of the United States* v. *Planters' Bank*, 9 Wheaton, 904 (1824), was cited on the argument by the Solicitor General of the United States. In that case Chief Justice MARSHALL said at page 907:

"It is, we think, a sound principle, that when

> a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates, and to the business which is to be transacted."

This reasoning seems very near that of the Court in the *South Carolina case*, for Mr. Justice BREWER says at page 463:

> "It is reasonable to hold that while the former [*i.e.*, the United States] may do nothing by taxation in any form to prevent the full discharge by the latter [*i.e.*, a State] of its governmental functions, yet whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation."

Suggesting a similar line of thought Mr. Justice BREWER also said in the *South Carolina Case* at page 461:

> "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

By "these decisions" the Court meant the *Veazie Bank Case*, *The Collector* v. *Day*, *United States* v. *Railroad Company* and the *Ambrosini Case*, all of which have been discussed in this brief. Those cases are the only ones which the Court had immediately referred to in that connection. There is, therefore, no reason to suppose that the language of Mr. Justice BREWER was

intended in any way to affect the rule exempting United States letters patent or United States corporate franchises from State taxation. That being so, the *South Carolina Case* expressly omits to touch the cases which are especially in point in the case at bar. Moreover, if we take the words of the Court "of a strictly governmental character" we would assume that they would as aptly fit the function of creating a corporation out of a crown prerogative as they would the appointment and payment of a judicial officer, the borrowing of money for public purposes, or the taking of a bond under the police power. The exercise of the crown prerogative in creating corporations is, we take it, one of the "ordinary functions" of State government, and we gather from the opinion of the Court that such functions are not to be trenched upon by Federal taxation. For the Court says at page 451:

> "But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. * * *
>
> "Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the *ordinary functions* of government, * * *."

And as Mr. Justice BROWN, speaking for this Court in *Hale* v. *Henkel*, 201 U. S., 43, said at page 74:

> "The corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public."

But there is a further and very wide distinction between the *South Carolina Case* and the corporation tax on the Stone Tracy Company.

The tax was laid on the South Carolina dispensaries not because they were empowered by the State, but because

they dealt in liquors. The corporation tax law falls upon the Stone Tracy Company because it is empowered by the State and not because it does a general mercantile business. In the South Carolina case the tax is not upon the power of South Carolina to create the State dispensaries. In the case at bar the tax is upon the power of Vermont to grant and preserve a franchise to the defendant corporation. If, through lax enforcement of the South Carolina liquor laws, persons other than State agents sell liquor in South Carolina, such persons are required to pay the United States liquor taxes. On the other hand, in Vermont, individuals and partnerships engaged in the same business as the Stone Tracy Company are not subject to the corporation tax because they are not chartered by Vermont. We have but to refer to the official report in the *South Carolina Case* to find that in spite of the State statute confining the sale of liquors to the State dispensaries, the United States liquor taxes were collected from two hundred and sixty private dealers in the State. It is therefore clear that the two cases are not parallel, and that the principle of the *South Carolina Case* is merely that a State, by entering the field of private business and engaging in a trade which has always been taxed by the United States, cannot use its sovereignty to avoid the tax which others in the same State and in other States are required by ancient Federal statutes to pay as a license on such trade.

We cannot be criticized for producing no case in which a Federal tax upon corporate charters has been declared unconstitutional, because until the enactment of the ex-

traordinary law now under consideration no such tax has been imposed by Congress. In one hundred and twenty-two years of legislation under the Constitution the corporation tax of 1909 is the first of its kind.

While we can produce no decision, we have shown the principle underlying all the decisions respecting infringement by taxation upon the sovereignty either of the Nation or of the States, and that principle as clearly forbids a Federal tax upon the States' exercise of crown prerogatives as it does a State tax upon a Federal franchise. If we run through the cases decided by this Court we find expressions, not decisions, it is true, but expressions indicating that in American jurisprudence the power to tax a corporate franchise rests only with the State which creates it. Thus: where Mr. Justice WOODBURY, in a concurring opinion (6 Howard, at page 548), spoke of a corporate franchise as a contract between the State and a corporation which "may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it;" where Mr. Justice SWAYNE said (15 Wallace, at page 296) that it was "not to be questioned that the States may tax the franchises of companies *created by them*"; where Mr. Justice BRADLEY (21 Wallace, at page 473) spoke of the "very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises, and its corporations;" where Mr. Justice JACKSON, then Circuit Judge (52 Fed. Rep., at pages 112–3) spoke of the right of Congress to place restrictions upon the rights of corporations created by its authority as distinguished from corporations created by

the States; or where the precise point was conceded for argument's sake in the opinion of Mr. Justice PECKHAM in *Nicol* v. *Ames*, already quoted.

And, though found in a dissenting opinion, we think the language of Mr. Justice BREWER in speaking for himself and the Chief Justice accurately reflects the principle. He said:

> "It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority."
>
> *Hale* v. *Henkel*, 201 U. S., 43, 86.

We have shown, beyond the possibility of dispute, we think, that the burdens of the corporation tax law fall on the franchise of the defendant corporation and on the franchise of every corporation. It follows irresistibly from this that the law puts a burden on the power of the States to create corporations. The mere phraseology used in the statute—"special excise tax with respect to the carrying on or doing business"—counts for little as against the substance and effect when the constitutionality of the law is attacked.

> *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429, 580-1 (1895).
>
> *Knowlton* v. *Moore*, 178 U. S., 41, 81 (1900).
>
> *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397, 411 (1904).

As Chief Justice MARSHALL said:

> "Is the proposition to be maintained, that the Constitution meant to prohibit names and not things?

> That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing?
>
> *Craig* v. *Missouri*, 4 Peters, 410, 433 (1830).

So we cannot believe that this Court will permit the plain language of the tenth amendment to the Constitution to be evaded by a device which clothes an invasion of State sovereignty in a new name.

We submit that among the "ordinary functions" of State government is the creation of corporations, and that the exercise of a prerogative of sovereignty in creating them is "strictly governmental." If it is not essential to the existence of the States in the measure of independence guaranteed them by the Constitution that this function should remain unimpaired, it is for the States so to decide in a constitutional manner. Possibly, on the submission of a constitutional amendment giving Congress power to tax the franchises of State corporations, the States might grant it, but until they do so it is not consistent with our frame of government and duality of sovereignty to presume on such consent.

The invasion of State sovereignty through the corporation tax is actual and real. It is not mere assertion of a conclusion by the pleader that if this defendant corporation discloses to its competitors its private affairs and is liable to a tax of this sort it will have to surrender its charter. No person of the slightest business experience can doubt that the imposition of the tax and the forced publicity of corporate affairs as distinguished from the

privacy of the affairs of partnerships and individuals and their exemption from a like tax will drive to the wall this defendant corporation and all similar small corporations which compete with partnerships and individuals. It may not seriously affect the larger and stronger corporations with which the investor is familiar, but it is beyond peradventure that the small corporations which live surrounded by competitors will be extinguished by this devastating law if this Court permits the law to stand. There never has been a better illustration of the truths that the power to tax involves the power to destroy and that the power to destroy may render useless the power to create. All the reserved power of the States to create these small corporations would be rendered as useless as if it never had existed.

It is no answer to say, as the directors of the defendant corporation have said, that a co-partnership may be formed to take over the assets of the Stone Tracy Company. That company, as a corporation, as a body created by the State of Vermont, is threatened with extinction through the enforcement of a Federal statute and it would be absolutely frivolous to suggest as a defense of the statute that the assets of the corporation could be saved from the wreck and turned over to another concern.

In this case, then, the operation of the law would result in confiscation instead of taxation.

"*For taking away our charters*" was one of the grievances of the American colonies against the King of Great Britain. At the time the Declaration (containing these very words) was written the people of Vermont had already rendered conspicuous service in the war for inde-

pendence. It would be an astonishing result if, years after that independence had been won, it should be found that the government established by the colonies themselves had become an instrument "for taking away our charters."

The decision which we ask this Court to make involves no diminution of the potential resources of the National Government. A result of that nature harassed the thoughts of some of the members of this Court when the Income Tax cases were pending. This is no such case. The taxing power of the Federal Government may reach the business of the defendant corporation for two per cent., for ten per cent., for fifty per cent., if necessary, if it will but seek out all who are engaged in the same business and not attempt to tax the corporate franchise. It is that attempt by Congress to tax a franchise created by the State and not the general power to tax that makes this argument.

We summarize our argument in support of the proposition that the general government cannot tax the franchise of a State corporation thus:

FIRST: A State cannot tax an instrumentality of the Federal Government (*McCulloch* v. *Maryland*, 4 Wheaton, 316; *Osborn* v. *United States Bank*, 9 Wheaton, 738; *Weston* v. *City Council of Charleston*, 2 Peters, 449; *Dobbins* v. *The Commissioners of Erie County*, 16 Peters, 435; *Bank of Commerce* v. *New York City*, 2 Black, 620.)

SECOND: For the same reason, and because a State is as independent a sovereignty within its sphere as the National Government, Congress cannot pass any law taxing an in-

strumentality of a State (*Collector* v. *Day*, 3 Clifford, 376; s. c. 11 Wallace, 113; *United States* v. *Railroad Company*, 17 Wallace, 322; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429.)

THIRD: The Federal Courts have assumed, and the highest State Courts have decided, that a State cannot tax patents granted by the general Government (*McCulloch* v. *Maryland*, 4 Wheaton, 316; *Patterson* v. *Kentucky*, 97 U. S., 501; *Webber* v. *Virginia*, 103 U. S., 344; *Allen* v. *Riley*, 203 U. S., 347; *In re Sheffield*, 64 Fed. Rep., 833; *Commonwealth* v. *Westinghouse Co.*, 151 Pa. St., 265; *The People ex rel. Edison Co.* v. *Board of Assessors*, 156 N. Y., 417.) A patent is a franchise (*Bloomer* v. *McQuewan*, 14 Howard, 539), that can be granted concurrently by both the State and the United States (*Livingston* v. *Van Ingen*, 9 Johnson, 507; 1 Robinson on Patents, Section 45), and is clearly not an instrumentality of either State or Federal Government.

FOURTH: This Court has held that a State cannot tax the franchise granted to a Federal corporation, and the decision is placed not upon the ground that the corporation is an instrumentality of the Government, but because the franchise "emanates from, and is a portion of, the power of the Government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the Government, and repugnant to its paramount sovereignty" (*California* v. *Central Pacific Railroad Co.*, 127 U. S., 1, 41).

FIFTH: Inasmuch as the principle of the decision that a State cannot tax a Federal instrumentality was held to

apply when the question was reversed and Congress undertook to tax a State instrumentality, it would seem to follow that the reasons and principles for the decision that a State cannot tax a Federal corporate franchise would also apply to an attempt by the General Government to tax a corporate franchise granted by a State.

We close this point with quotations from opinions of this Court which fully cover the field of this argument.

> "It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the general government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence, without its consent, or attempt to exonerate them from the performance of any duties, or the payment of any taxes or contributions, to which their position, as creatures of State legislation, renders them liable." (Opinion of the Court by Chief Justice FULLER in *Central Pacific Railroad* v. *California*, 162 U. S., 91, 122, quoting from dissenting opinion of Mr. Justice BRADLEY in *Railroad Co.* v. *Peniston*, 18 Wallace, 5, 48).
>
> "Every State has a sphere of action where the authority of the national government may not intrude. Within that domain the State is as if the Union were not. Such are the checks and balances in our complicated but wise system of State and National polity." (Opinion of the Court by Mr. Justice SWAYNE in *Farrington* v. *Tennessee*, 95 U. S., 679, 685.)
>
> "That principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency." (Opinion of the Court by Mr. Justice FIELD, in *Wisconsin Central Railroad* v. *Price County*, 133 U. S., 496–504.)

"In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one of the chief functions of this Court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other." (Opinion of the Court by Mr. Justice BREWER in *Matter of Heff*, 197 U. S., 488, 505.)

SECOND POINT.

The defendant corporation would be deprived of its property without due process of law.

We have shown that the corporation tax law, if it is found to impose in substance a tax on the franchise of the corporation (whether it take the form of a franchise tax, a license tax, an occupation tax or any other species of tax or excise), must be declared an unconstitutional invasion of the sovereignty of Vermont. While we believe that the Court will find the law to be unconstitutional on that ground, nevertheless if there can be a judicial conception of the corporation tax law which attributes to a cause other than the existence of the franchise and the corporate capacity the liability of the defendant corporation to the burdens of this statute, or if, as we believe, corporate capacity is the cause of liability, we propose showing that the statute, however construed, would deprive the defendant corporation of its property without due process of law.

In taking up this branch of our argument we assert that no justification for this tax is to be derived from any analogy to State corporation taxes. The relation of the States to corporations is different from the relation of the United States to the defendant corporation. A State grants a corporate charter, and it may impose on that charter such conditions to the grant, whether in the form of taxes or otherwise, as it sees fit. The State, also, has the power of excluding from its borders any foreign corporation, and may impose upon foreign corporations, as a condition to being allowed to do business and exercise their corporate franchises within the State, any tax or other burden. A brief examination of some of the decisions of this Court will disclose full support for what we have stated.

Franchise taxes imposed by States on corporations created by such States have frequently been considered and sustained by this Court.

Society for Savings v. *Coite*, 6 Wallace, 594 (1867).

Provident Institution v. *Massachusetts*, 6 Wallace, 611 (1867).

Hamilton Company v. *Massachusetts*, 6 Wallace, 632 (1867).

Home Insurance Co. v. *New York*, 134 U. S., 594 (1890).

And we understand that the true theory upon which a State may tax a franchise granted by it is that stated by Mr. Justice FIELD in *Home Insurance Co.* v. *New York*, 134 U. S., 594, 600 (1890):

> "The granting of such right or privilege rests entirely in the discretion of the State, and, of

course, when granted, may be accompanied by such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe."

The States also for years have been requiring the payment of license fees from foreign corporations as a condition to the right to do business or to exercise their corporate franchises within such States. These license fees are not franchise taxes. They are the price which the States, having the right to exclude foreign corporations altogether, may exact for the privilege of entering such States and doing business therein. The theory upon which these license fees are exacted is stated by the same learned Justice.

In *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S., 181 (1888), Mr. Justice FIELD, said at page 186:

"We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents, and employes; nothing more and nothing less; * * *."

And in the case of *Horn Silver Mining Co.* v. *New York*, 143 U. S., 305 (1892), he said at page 315:

"Having the absolute power of excluding the

> foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges."

See also to the same effect

> *Maine* v. *Grand Trunk Railway Co.*, 142 U. S., 217, 227–8.

Neither the reason of the State franchise taxes nor of the State license taxes on foreign corporations can support the constitutionality of the Federal corporation tax on the defendant corporation; for the defendant corporation was not created by the United States nor has the United States the right to say it shall not do business in Vermont in a corporate capacity.

We understand that the only thing that would prevent the State corporation tax laws from being held to deny to corporations the equal protection of the laws is that the State itself granted the charter and may prescribe the conditions under which it is enjoyed. In *Berea College* v. *Kentucky*, 211 U. S., 45, Mr. Justice BREWER said at page 54:

> "In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction it has more or greater powers because the citizen has. 'The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the State, and, of course, when granted,

> may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy.' * * * * Such a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the State."

Congress, then, in classifying corporations as the objects of a special corporation tax assumes that apart from the reasons why a State may so classify them, there is some other basis for classification. We submit that there is none and that every feature of business peculiar to corporations is an incident inherent in the franchise granted and exempt from Federal taxation. The defendant corporation in its business of dealing in merchandise pursues the same methods as the firm of Dwight Tuxbury & Sons. It buys for cash or on credit in the same way as the firm. Precisely as the firm, it endeavors to sell at a profit for cash, or credit, or for commodities. No drummers selling goods in Windsor could perceive any essential difference between the shops of Dwight Tuxbury & Sons and the Stone Tracy Company. No customer in buying goods in Windsor could see any essential difference between the two shops. They are, to all intents and purposes, of the same class. To subject one and not the other to a tax "in respect to the carrying on or doing business" seems the extreme of arbitrariness.

We quote from the opinion of this Court in two cases. In *Kansas Pacific Railroad Co.* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 112 U. S., 414 (1884), Mr. Justice FIELD, speaking for the entire Court, said at page 415:

> "A private corporation is, in fact, but an associ-

> ation of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members without dissolution."

And again, the same learned Justice in *McKinley* v. *Wheeler*, 134 U. S., 630 (1889), speaking for the entire Court, said at page 633:

> "They are little more than aggregations of individuals united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution."

Therefore for Congress to classify corporations as the objects of a special and discriminating tax, whether the burdens are light, oppressive or wholly confiscatory, is utterly arbitrary. We think that our position is well stated by Mr. Justice FIELD's concurring opinion in *San Bernardino County* v. *Southern Pacific Railroad Company*, 118 U. S., 417 (1885), where he was discussing the quite analogous case of a State's denying the equal protection of the laws to a corporation in the method of valuing property for taxation. He said at page 422:

> "I agree to the judgment of the court in this as also in the other tax cases from California. But I regret that it has not been deemed consistent with its duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the Circuit Court, and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth

Amendment of the Constitution. At the present day nearly all great enterprises are conducted by corporations. Hardly an industry can be named that is not in some way promoted by them, and a vast portion of the wealth of the country is in their hands. It is, therefore, of the greatest interest to them whether their property is subject to the same rules of assessment and taxation as like property of natural persons, or whether elements which affect the valuation of property are to be omitted from consideration when it is owned by them, and considered when it is owned by natural persons; and thus the valuation of property be made to vary, not according to its condition or use, but according to its ownership. The question is not whether the State may not claim for grants of privileges and franchises a fixed sum per year, or a percentage of earnings of a corporation—that is not controverted—but whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here and continue to come until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions."

We say that classifying corporations by Congress for the imposition of Federal taxes and other special burdens takes their property without due process of law and without just compensation in violation of the Fifth Amendment.

What is "due process of law"? It is process which accords with those "immutable principles of justice which "inhere in the very idea of free government" (*Holden* v. *Hardy*, 169 U. S., 366, 389), which proceeds from "laws

" operating on all alike and not subjecting the individual " to an arbitrary exercise of the powers of government un- " restrained by the established principles of private rights " and distributive justice" (*Leeper* v. *Texas*, 139 U. S., 462, 468). These principles have been stated time and again in the opinions of this Court from the case of *Bank of Columbia* v. *Okely*, 4 Wheaton, 235, 244, to the case of *Twining* v. *New Jersey*, 211, U. S. 78, 101–2.

Congress must conform to these principles in the passage of every law. As Mr. Justice CURTIS, speaking for the entire Court in *Murray* v. *Hoboken Land Co*·, 18 Howard, 272 (1855), said at page 276:

> "But is it 'due process of law'? The Constitution contains no description of those processes which it was intented to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."

The defendant corporation is entitled to the protection of this constitutional safeguard for, as Chief-Justice WAITE said in the *Sinking Fund Cases*, 99 U. S., 700, at page 718, the United States "equally with the States" "are prohibited from depriving persons *or corporations* " of property without due process of law."

The limitations on the powers of Congress to levy and collect taxes are not alone in those provisions of the Federal Constitution which relate exclusively to taxation.

As Mr. Justice FIELD said in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 599:

> "There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations * * * of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations."

We therefore say that the arbitrary action of Congress in placing these unprecedented and oppressive burdens on the defendant corporation and wholly exempting its business competitor from every one of them is not due process of law. We weigh the situation by the opinions of this Court.

In *Ballard* v. *Hunter*, 204 U. S., 241 (1907), Mr. Justice MCKENNA, quoting with approval from Mr. Justice BRADLEY, said, at page 255:

> "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvement, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law.'"

The arbitrary discrimination against the defendant corporation would surely be a denial of the equal protection of the law if the language of the fourteenth amendment applied to an act of Congress.

In *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S., 283 (1898), Mr. Justice MCKENNA said, page 294:

> "'Clear and hostile discriminations against particu-

> lar persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice Bradley, in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232, 237.
>
> "And Mr. Justice Brewer, in *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S., 150, 165, after careful consideration of many cases, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

It seems as if the case at bar furnished the strongest possible instance of where "a tax law directly, necessarily "and intentionally creates an inequality of burden," to quote the expression used by Mr. Justice BREWER in his dissenting opinion in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., at page 301, and that in his language "it becomes imperative to inquire whether this inequality "thus intentionally created can find any constitutional "justification."

The denial of equal protection of the laws and the taking of property without due process of law are, so far as this case is concerned, the same thing, because the injury complained of lies in the enforcement of a statute which is unequal and arbitrary. As Chief Justice FULLER said in speaking for the entire Court in *Duncan* v. *Missouri*, 152 U. S., 377 (1894):

> "Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In *Gulf, Colorado and Santa Fe Railway Co.* v. *Ellis*, 165 U. S., 150 (1897), it appears that a Texas statute provided that if claims on contract or in tort against railroad corporations were not promptly paid, the plaintiffs suing thereon and obtaining judgment for the full amount, might add thereto an attorney's fee of ten dollars. "The "single question in this case is the constitutionality of "the act allowing attorneys' fees. The contention is "that it operates to deprive the railroad companies of "property without due process of law, and denies to them "the equal protection of the law" (pp. 152–3). Railroad companies alone were subject to the burdens of the statute.

The Court pointed out that classification of railroads for certain purposes was just; as, for example, for fencing tracks, or for the use of safety-couplers (pp. 158–9), but that every lawful classification "must rest upon some difference "which bears a reasonable and just relation to the act in "respect to which the classification is proposed, and can "never be made arbitrarily and without any such basis" (p. 155). And Mr. Justice BREWER, in delivering the opinion of the Court, also said, at page 159:

> "The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed

upon others guilty of like delinquency this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, in *Yick Wo* v. *Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." * * *

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." (Pages 165–6.)

It was held in the *Ellis Case* that to compel a corporation to pay an attorney's fee to a plaintiff who was successful in a case against it, and not to require an individual defendant to pay an attorney's fee under the same conditions, was as arbitrary, and unfair, and unequal, and unjust as to compel a white defendant to do so and not require a black defendant to do so. In other words, a corporation was placed precisely on the same basis as an individual.

Now the taxing power of the Federal Government (if this tax is to be deemed an excise or occupation tax, which we deny) is to be exercised on the people doing business in the United States, that is, on the business done in the United States. Now the business of this country is done by the people either in an individual capacity, or in a partnership capacity, or in a corporate capacity, and the selection for taxation of one class out of all the people doing business in this country is, we submit, class legislation and unequal.

If the Federal Government in laying this tax had imposed it alone on people doing business in this country in an individual capacity, would there be much doubt in anybody's mind but that the selection for taxation of individuals alone would have been arbitrary and unequal and a deprivation of their property without due process of law?

If the taxing power had selected for taxation from all the people doing business in this country only those doing business in a partnership capacity, would such a discrimination have been deemed a lawful classification, and one which rested "upon some difference which bears a

reasonable and just relation to the act in respect to which the classification is proposed"?

Now if the selection, for taxation by the general government from all the people doing business in this country, of only those who do business in an individual capacity, or of only those who do business in a partnership capacity, is arbitrary and unlawful, then it must follow that the selection for taxation of those alone who do their business in a corporate capacity is equally arbitrary and unjust; for under the decision of the *Ellis Case* the corporation and the individual stand on the same ground so far as in this country there rests on Congress and State Legislatures the obligation to make equal laws.

It is of no importance that the Fifth Amendment to the Constitution contains no specific clause as to the equal protection of the laws. Congress cannot from such omission claim the right to enact laws which are unjust, unequal, oppressive and arbitrary. No such extraordinary claim has ever been or ever will be made. With the concession that a federal law which deprives a man of his property is arbitrary and unequal, it follows that such law deprives him of his property without due process of law, and is in clear violation of the provisions of the Fifth Amendment to the Constitution.

The Fourteenth Amendment to the Federal Constitution is but declaratory of the law as it had long existed. There was nothing new in it and the provision as to the equal protection of the laws was simply a restatement of an old idea.

As long ago as 1778 Sir William Meredith speaks of the importance of equal laws in his work entitled—"His-

torical Remarks on the Taxation of Free States" (published in 1778), as follows at p. 39.

> "If many a page in the history of worldly interest and ambition did not prove the fact, it would be thought incredible that, in a country of liberty, men can be found ready to promote measures that tend to destroy that property in equal laws, which constitutes the best part of a free man's inheritance."

This provision of the Fourteenth Amendment as to equal laws was undoubtedly already covered by the previous clause in the same amendment forbidding a State to deprive any person of his property without due process of law, but was added to the amendment out of abundant caution, just as in the Fifth Amendment we find the clause, "nor shall private property be taken for public use, without just compensation," but do not find such clause in the Fourteenth Amendment.

The argument that, because such clause was omitted from the Fourteenth Amendment, therefore a State could take a man's property for a public use without just compensation has never been sustained by this Court, but it has been held that any State which undertakes to take property for a public use without just compensation deprives a man of his property without due process of law, and is therefore restrained from so doing by the provision of the Fourteenth Amendment that no State shall deprive any person of property without due process of law. *Chicago, Burlington and Quincy Railroad Co.* v. *Chicago*, 166 U. S., 226, 241.

We simply apply the principle of the decision just cited and insist that the omission from the Fifth Amendment of the provision as to the equal protection of the laws does not give the right to Congress to pass an un-

equal and oppressive law, as such a law would in effect take property without due process of law and is clearly forbidden by the provision of the Fifth Amendment which says that no person shall be deprived of property without due process of law.

In *Colting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79 (1901), this Court unanimously held that a Kansas statute which purported to regulate rates and other matters at stock yards transacting above a certain amount of business, and which statute in reality touched only the defendant, denied to the defendant the equal protection of the laws.

Mr. Justice BREWER said at page 111:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540 (1902), this Court held that the Illinois statute prohibiting illegal combinations in business was unconstitutional because it discriminated against certain classes of industry. The character of the statute is well illustrated by the following extract from the opinion of the Court by Mr. Justice HARLAN at page 564:

> "Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or

acts for the purpose of establishing, controlling, increasing or reducing prices, or preventing free and unrestrained competition amongst themselves or others in the sales of their goods and merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

In the two latter cases the majority of the Court expressly reserved the question whether the unconstitutional features of the statutes there under consideration would not also work a taking of property without due process of law.

In these cases the Court mentions a theory that in tax statutes the States are permitted a more unbridled lati-

tude in discriminating or in "classifying" as it is called. This distinction Mr. Justice McKenna in his dissenting opinion in the case last cited (p. 570) seemed to deny; and the opinion of the Court in *Cox* v. *Texas*, 202 U. S., at pages 450–1, seemed to question its existence; but whether it really exists or whether its existence rests on any permanent and logical foundation, it seems clear that even in tax statutes the Federal constitution cannot be utterly disregarded. The language in one of these tax cases—*Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232—has already been quoted. That case clearly indicates the law to be that "clear and hostile" discrimination against a class, especially such a discrimination as is "unusual" or "unknown," would render any tax statute unconstitutional, while discrimination which proceeds "within reasonable limits and general usage" would be sustained. While in that case the lawmaking power was the same power as that creating the corporation which was taxed, we ask no greater protection than what this Court thus intimated could be afforded under the Federal Constitution. The "corporation tax" declares a discrimination "clear and hostile" upon companies which owe the general government no allegiance and no debt for their creation. It is a discrimination "unusual" to the extent of being without a precedent in the history of the country and is therefore wholly "unknown." We have shown that it does not proceed within "reasonable limits," for in the reason of things there is no basis for the discrimination; and as for being within "general usage," the fact that it was hitherto unknown condemns it upon that ground.

So in many of the recent tax cases where the tax was sustained and where the right of the State to classify was admitted, it was clearly intimated that the protection of the Federal Constitution still exists where due process and equal protection of law is denied. For instance, in *American Sugar Refining Company* v. *Louisiana*, 179 U. S., 89–92, it was said that "arbitrary, oppressive or capricious" discrimination would deny the equal protection of the laws; and in *Billings* v. *Illinois*, 188 U. S., 97–101, it was said that "classification must be based on some reasonable ground."

We therefore are safe in saying that if statutes respecting taxation are entitled to looser treatment than other statutes in testing their constitutionality, there are still clearly the requirements that such statutes must not discriminate on unreasonable grounds and must not be oppressive or arbitrary. These requirements the corporation tax law completely disregards.

The latest utterance of this court on the subject is found in *Southern Railway Company* v. *Greene* (Decided Feb. 21, 1910), where it was held that a statute of Alabama requiring a foreign corporation, authorized to do business in the State, to pay a special tax denied to such corporation the equal protection of the laws, for the reason that domestic corporations "owning the same character of property and carrying on the same kind of business" were not required to pay a similar tax. In the course of his opinion Mr. Justice Day said:

> "We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is within the meaning of the Fourteenth

Amendment, a person within the jurisdiction of the State of Alabama, and entitled to be protected against any statute of the State which deprives it of the equal protection of the laws.

"It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155, 165; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559.

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign

corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

If a law selecting for purposes of taxation foreign corporations out of all the corporations doing business in a State is deemed arbitrary and an unwarranted classification because one corporation is taxed and another "owning the same character of property and carrying on the same kind of business" is not, it is difficult to see why the imposition of a tax upon a corporation and the exemption from taxation of a partnership "owning the same character of property and carrying on the same kind of business" is not equally arbitrary and unequal.

THIRD POINT.

The Corporation Tax Law is unconstitutional because it takes property for public use without just compensation.

We further say that the Corporation Tax Law is unconstitutional because taking private property for public use without just compensation. We do not refer especially to the one per cent. collected on the net income over five thousand dollars or to the incidental extinction of the corporate franchise, but rather to the peculiar requirement of Subdivision 6 of the corporation tax law which says that the returns "*shall constitute public records and be open to inspection as such.*"

Under the provision quoted the Stone Tracy Company's debts, its gross income, its dividends received, its expenses, rentals and franchise payments, its losses, its allowances for depreciation, its interest paid on its indebtedness, its taxes and its net income become publicly known. Thus that property which the defendant corporation has in the privacy of its affairs, in keeping to itself the contents of its books, papers and accounts and its trade secrets, is not only invaded but destroyed. Such property is, we take it, of a kind of which the Federal Constitution was designed to take most jealous care, for the Fourth Amendment provides that the right to such property shall not be violated by unreasonable searches and seizures.

We desire to impress upon the Court that the publicity of the returns under the Corporation Tax Law is not required for the purpose of imposing the tax. After the

assessment is made, and the Government has entirely finished with the returns, then they are to become for the first time public records open to inspection. Even if no tax is levied by the Commissioner of Internal Revenue, because there is no income in excess of five thousand dollars, yet the return is still required to become a public record open to inspection. All tax laws require full returns to be made for the information of the Government to be used in laying the tax, but no law that we know of ever before provided that when the Government had imposed the tax, and finished with the returns, they should then be made public property.

This property is not only taken, but it is taken without just compensation and for no cause which stands in legitimate relation to the power to tax. Manifestly, the exposure to the public of the contents of the defendant corporation's return, after the assessment is made and falls due, can in no way enhance the public revenues. It is an arbitrary and wholly independent action on the part of the government, visitatorial and disciplinary in its nature, and not, in any sense, for revenue purposes.

There is no question that a corporation is protected under the Fifth Amendment against the taking of its property without just compensation.

> *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312 (1893).

And in the case of *Hale* v. *Henkel*, 201 U. S., 43 (1906), Mr. Justice Brown, in delivering the opinion of the Court, said at page 76:

> "We do not wish to be understood as holding that a corporation is not entitled to immu-

nity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination."

FOURTH POINT.

The corporation tax is a direct tax on the franchise and therefore unconstitutional because not apportioned.

We believe that we have shown beyond doubt that this tax is laid upon the defendant corporation in respect to its franchise to be a corporation and to act in a corporate capacity. We shall now proceed to show that it is also a direct tax.

We do not need to weary the Court with the earlier cases decided by this Court on the question of direct and indirect taxation, but we shall start with the assumption that a tax on personal property may be a direct tax within the decisions in the Income Tax Cases of 1895.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S.,429; s. c. 158 U. S., 601.
Nicol v. *Ames*, 173 U. S., 509, 520.

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no

limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid."

California v. *Central Pacific Railroad*, 127 U. S., 1, 41–42.

A franchise cannot be regarded as an article of consumption like manufactured tobacco. It is not intended for consumption or sale. Therefore a tax on a franchise can not be imposed on it at a period intermediate the commencement of its manufacture and the final consumption of the article within the rule of *Patton* v. *Brady*, 184 U. S., 608. The tax cannot be avoided by the owners for the time being through a subsequent sale or consumption of the franchise and so become an indirect tax. It remains distinctly of the nature of a capitation or other direct tax. It is, as stated by Professor Beale in his work on Foreign Corporations, "in the nature of a poll tax."

Beale on Foreign Corporations, Sec. 508, p. 665.

So Judge GARRISON in the case of *The Lumberville Delaware Bridge Co.* v. *State Board of Assessors*, 55 N. J. Law, 529, said in speaking of the New Jersey franchise tax:

(Page 537) "It is in short a poll tax levied upon domestic corporations for the right to be."

We therefore submit that it imposes a direct tax on the franchise of the defendant corporation.

FIFTH POINT.

The inclusion of joint-stock companies within the terms of the statute does not affect the argument in the previous points.

We have treated the statute in our argument as if it were literally a corporation tax. That the substance and spirit of the law is to impose a corporation tax we think there can be no room for doubt; but included in the phrasing of the statute is also "every * * * joint-stock company or association * * * now or hereafter organized under the laws of the United States or of any State, * * * ."

In this country joint-stock companies are quite unusual. Whether their precise number, all told, is six or sixty is immaterial, but except for two or three of the larger express companies we presume that most American lawyers have no practical acquaintance with joint-stock companies or associations. In some cases these companies or associations are considered as partnerships, in others they are considered as corporations. But under whatever name they may go we think that if a company consists of a voluntary association, without deriving from public authority any rights which the members could not have exercised in their natural and individual capacity, that company is a partnership, while, on the other hand, if through public authority the association becomes vested with rights, privileges or franchises which the members could not have enjoyed as individuals or as an

ordinary partnership, then the company partakes of the nature of a corporation and virtually is such.

It is quite clear, apart from the wording of the corporation tax law, that the framers of the law never intended it to apply to a partnership of any kind, for a few hours before the passage of the corporation tax amendment this colloquy occurred in the Senate:

> "Mr. Brandegee: Does the Senator desire to answer my inquiry as to whether the matter of imposing a tax upon partnerships was considered at all by the committee?
>
> "Mr. Aldrich: I will say that it was considered, and the committee thought it raised a cloud of questions which they did not care to discuss or to dispose of" (44 Cong. Rec., 4093).

But the statute itself disposes of the question by selecting only such joint-stock companies as are "organized under the laws of the United States or of any State," etc., which therefore means only those that have been legalized—*i. e.*, enfranchised—by public authority.

In *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall., 566 (1870), this Court held that a British insurance company organized under acts of Parliament as a joint-stock company was a corporation and would be held so under the laws of most of the States although in that case the stockholders were individually liable for debts of the company. The Court held that its distinctive and artificial name by which it made its contracts, its power to sue and be sued in the name of one of its members, the power of members to transfer their interests at pleasure, the power of surviving beyond the lives of its members, etc., all having been legalized by acts of Parliament, assimilated the company to a corporation under our

laws, and in the concluding paragraph of the opinion Mr. Justice MILLER said at page 576:

> "We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation * * *."

In the case of *Attorney General* v. *Mercantile Marine Ins. Co.*, 121 Mass., 524 (1876), it was held that under the Massachusetts statutes joint-stock companies were to be regarded as corporations organized under general laws as distinguished from corporations formed under special charters.

In *People ex rel. Platt* v. *Wemple*, 117 N. Y., 136 (1889), the United States Express Company, one of the very few important joint-stock companies in America, was said to have "the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships" (p. 144). That case is especially interesting from the fact that it involves the interpretation of a tax statute of New York which was evidently taken in part as the form for the corporation tax law of 1909. The New York statute provided that:

> "Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country, and doing business in this State * * * shall be subject to, and pay a tax, as a tax upon its corporate franchise or business" * * *.

The United States Express Company maintained that it was a mere partnership and not within the statute, but

the Court, pointing out the articles of association and the peculiar rights which it purposed exercising and that statutes of the State of New York provided for just such an organization, concluded that it was not a partnership and was taxable. From the opinion of the New York Court of Appeals we extract the following at page 146:

> "In view of the capacities and attributes with which, as we have seen, the United States Express Company is endowed, and in view, also, of the statutes which legalize its assumed capacities and make valid and effective its asserted right of succession, its distinctive name and the alienability of its shares, we find nothing to warrant the contention of the appellant that it is a mere partnership, existing only under its articles of agreement and association. It is true those articles contain no reference to any statute of the State, as one under or by which the company was organized, yet, by the very constitution of the body itself and the privileges and powers which it can only exercise by virtue of those statutes, it must be taken to belong to one of those classes of artificial beings described in the Act of 1880 (*supra*) as 'a corporation, joint-stock company or association.' The several persons composing it are made into a collective body and are given capacity in its name, and not their own, to take, grant, sue and be sued. Thus they are united, or organized, or incorporated. The death of a member causes no interruption, and the power of continued existence of this one body, and its organized or corporate action is derived from no inherent power of one or all of its members, but from the law, which sanctions the union."

And on page 147:

> "In the case before us the agreement, which brought many persons into one artificial body, was so framed as to accomplish that end, and in proposing to conduct its affairs by the power given to it in the mode prescribed by the legislature, they must be deemed, for the purposes of the act in question, to be incorporated,

> that is, formed or united under the law of the State, whether the artificial body be termed a corporation, a joint-stock company, or association."

We think it therefore perfectly clear that the corporation tax law in including joint-stock companies and associations "organized under the laws of the United States or of any State" meant to include only those companies which by virtue of such laws have powers, privileges or franchises similar to those of corporations. It follows from this that the joint-stock companies stand on the same basis as the corporations as far as the corporation tax is concerned.

We have, perhaps, extended this point more than was necessary because it seems to us that it is really immaterial how the Court views the joint-stock companies within the provisions of the act. If they are partnerships it must be admitted that they are peculiar, limited and few in number. If it be said that Congress has selected that peculiar form of business organization as one of the objects of taxation under the corporation tax law and if it be said that joint-stock companies have no corporate franchises or other franchises created by sovereignty, such propositions, even if they were sound, would not in the slightest degree sustain Congress in also selecting for taxation corporate capacity and thereby placing a tax on corporate franchises. In other words if Congress could put an excise tax on joint-stock companies because they are partnerships enjoying no franchises from state sovereignty it does not follow that Congress may place a similar tax on corporate franchises enjoyed by corporations.

SIXTH POINT.

The judgment of the Court below should be reversed.

MAXWELL EVARTS,
HENRY S. WARDNER,
Of Counsel for Appellant.

Supreme Court U. S.
FILED
JAN 12 1911
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 407.

STELLA P. FLINT, as General Guardian of the Property of SAMUEL N. STONE, Junior, a Minor,
Appellant,

vs.

STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY and LEON B. HAYWARD,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

BRIEF FOR APPELLANT ON REARGUMENT.

MAXWELL EVARTS,
HENRY S. WARDNER,
Of Counsel for Appellant.

JOHN G. SARGENT, *Attorney General of Vermont, representing the State of Vermont, with Counsel for Appellant.*

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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BRIEF FOR APPELLANT ON REARGUMENT.

Statement.

In the year 1866 Dwight Tuxbury and Samuel N. Stone, both of whom are now deceased, formed a co-partnership for carrying on a general retail mercantile busi-

ness in the village of Windsor, Vermont, and that firm, called Tuxbury & Stone, carried on such business continuously, on the main street of the village, for upwards of twenty-nine years. The business was prosperous, and its shop became the principal one of its kind, not only in the village, but in an area of some ten square miles of the surrounding country. While the firm, from time to time, took in other partners, there was no essential change in the management until 1895, when the firm dissolved and two new firms were formed therefrom. One of the new firms was headed by Tuxbury, and was styled Dwight Tuxbury & Sons, while the other was headed by Stone, and was styled Stone, Tracy & Company.

The firm of Stone, Tracy & Company retained the original stand of Tuxbury & Stone, and engaged in the same business as had been carried on by the old firm. The firm of Dwight Tuxbury & Sons erected a building on the same street, and next door to Stone, Tracy & Company, and engaged in the same line of business.

In the year 1900 the persons composing the firm of Stone, Tracy & Company obtained from the State of Vermont a corporate charter, and, under such charter, organized a corporation, called the Stone Tracy Company, for carrying on a general retail mercantile business. The defendant corporation is the corporation so formed. It took over all the business of the firm of Stone, Tracy & Company, and has continued to carry

on at the original stand of Tuxbury & Stone a general retail mercantile business. In carrying on such business it has met the direct, active, and constant competition of the firm of Dwight Tuxbury & Sons, which firm has continued to carry on a general retail mercantile business next door to the shop of the defendant corporation and employing about the same amount of capital. The defendant corporation has prospered, and has transacted, during each of the last five years, a business of not less than from $75,000 to $100,000, which, in volume, approximates that carried on by its competitor. Continuing to compete next door to each other, these two shops have become the only general merchandise shops in the village, and the principal ones in a surrounding area of twenty square miles.

A return of the business of the defendant corporation if made as required by the provisions of the Act of Congress of August 5, 1909, relating to the so-called "corporation tax," through becoming a public record, will disclose to the firm of Dwight Tuxbury & Sons and to the public generally the gross income of the defendant corporation, its indebtedness, its dividends received, its expenses paid, its charges for depreciation, its rentals and franchise payments, its losses sustained, the interest paid on its debts, the amount of its taxes and its net income. The net income of the defendant corporation will exceed $5,000, and the corporation tax

will therefore be assessed. Since, under the provisions of the law, no such return and no such tax can be required of copartnerships, the firm of Dwight Tuxbury & Sons would be given a great advantage over the defendant corporation through the disclosure of the details of the business and private affairs and trade secrets of the defendant corporation, while no such disclosure of the affairs of the firm of Dwight Tuxbury & Sons would be required or permitted. The advantage thus given to the competitor of the defendant corporation would compel the defendant corporation to surrender its corporate charter, dispose of its assets and go into voluntary dissolution.

The complainant, as a stockholder of the Stone Tracy Company, requested the defendants to contest the constitutionality of the Corporation Tax Law and not to comply with its provisions, but the defendants refused to do so and assert that they intend to make the return and pay the tax.

Thereupon the appellant, who was the complainant in the Court below, brought, in the United States Circuit Court for the District of Vermont, her bill in equity as a stockholder in the defendant corporation to restrain it and its directors from voluntarily making the return of income and other details of its business, as required by the so-called "corporation tax" provisions of the Act of Congress of August 5, 1909, and from paying the tax. She averred in her bill that the law was an invasion of the

power of the State of Vermont to grant and preserve the charter of the defendant corporation, that making and publishing the return and paying the tax would be a taking of property without due process of law, and a taking of private property without just compensation, that the law violates the right of the defendant corporation to be secure in its papers and effects from unreasonable searches and seizures, that it imposes a direct and unapportioned tax on the franchise of the defendant corporation, and that if the tax is not direct it is not uniform throughout the United States (Record, pp. 6, 7).

She further averred that the defendants in intending voluntarily to comply with the act were intending to commit a breach of trust in disclosing to the chief competitor of the defendant corporation and to the public the private affairs of the defendant corporation and diverting its funds (Record, p. 5).

The case was one within the jurisdiction of the Circuit Court by virtue of Section 629, Subdivision 4, of the Revised Statutes of the United States, as one arising under a law providing internal revenue. The defendants demurred for want of equity. The Circuit Court sustained the demurrer and dismissed the bill and the complainant, setting forth that in this case the constitutionality of a United States statute was drawn into question, prayed an appeal to this Court, which was duly allowed (Record, p. 13).

The provisions of the "Corporation Tax Law" which are particularly discussed in this brief follow:

> "SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed * * *".

Subdivision Third of the above section requires every corporation subject to the provisions of the law to make and file a return showing the details of its business.

" SIXTH. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such."

Specification of Errors.

The Court below erred :

FIRST. In sustaining the demurrer of the defendants.

SECOND. In not overruling the demurrer of the defendants.

THIRD. In not holding that the Corporation Tax Law of August, 1909, is unconstitutional for the reason that the corporate franchise granted to the Stone Tracy Company by the State of Vermont is not a legitimate subject of taxation by the general government, and for the further reason that such taxation is a violation of the Tenth Amendment to the Federal Constitution.

FOURTH. In not holding said law unconstitutional for the reason that it is unequal, unjust and oppressive in that it singles out for taxation from all the men doing business in this country those alone who do their business in a corporate capacity, leaving untaxed their competitors doing business in an individual or a partnership capacity, and that such an unequal law de-

prives the Stone Tracy Company of its property without due process of law, in violation of the provisions of the Fifth Amendment to the Federal Constitution.

FIFTH. In not holding the said law unconstitutional for the reason that the provision requiring the publicity of the affairs of the Stone Tracy Company after the government has finished with the return and has levied the tax takes from said corporation its property, *i. e.*, its right to the privacy of its affairs, for a public use, without just compensation.

FIRST POINT.

The Corporation Tax Law, so far as it affects the defendant corporation, is unconstitutional because it invades the sovereignty of the State of Vermont.

A.

THE TAX AND THE OTHER BURDENS OF THE CORPORATION TAX LAW FALL UPON THE CORPORATE FRANCHISE OF THE DEFENDANT CORPORATION.

In his message sent to Congress June 16, 1909, the President, suggesting the passage of the corporation tax, said:

> "I therefore recommend an amendment to the tariff bill imposing upon all corporations and

joint stock companies for profit, except national banks (otherwise taxed), savings banks, and building and loan associations, an excise tax measured by 2 per cent on the net income of such corporations. *This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock*" (44 Cong Rec., p. 3344).*

On June 24, prior to the introduction of the Corporation Tax amendment, Senator Newlands said:

"If, however, it be held that the suggested tax is, as the President asserts, 'a tax upon the privilege of doing business as an artificial entity,' that is to say, a tax upon the right to be a corporation, it will probably be contended that the corporate franchise is the creation of the state sovereignty; that the power to tax is the power to destroy; and that the Nation has no power, for this reason, to tax the franchise granted by the State?" (44 Cong. Rec. 3757.)

On the following day the corporation tax amendment was introduced in substantially the form in which it was finally adopted. It provided:

"That every corporation, joint stock company or association, organized for profit and

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* The references to the Congressional Record are to pages of the regular bound edition and not to pages of the daily edition issues. The references in our former brief were to pages of the daily edition issues of the Congressional Record.

> having a capital stock represented by shares, and every insurance company * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to 2 per cent upon the entire net income over and above $5,000 received by it from all sources during such year * * *." (44 Cong. Rec., 3836.)

The amendment was redrafted and substantially reintroduced on June 29, but the provisions above quoted were not changed by that amendment. (44 Cong. Rec., 3935.)

In attempting to reply to Senator Brandegee's inquiry as to whether the tax was not on the privilege to do business, Senator Carter had this to say:

> "Mr. Carter: Mr. President, the Senator's discussion is very interesting and very instructive. According to my view, the Federal Government does not assume by the passage of this amendment to extend any privilege to any corporation in a State or to deny any right or privilege now enjoyed by a corporation organized by a State. The amendment merely proposes a classification of subjects for taxation. The corporation is not to be assessed for the privilege of doing business, because that privilege cannot be denied if the corporation is organized under the laws of a State, if its pur-

poses are legitimate and not in contravention of public policy. *The tax is assessed because certain business is being done in a certain form or method of organization, by incorporation or as joint-stock companies. It is not a license and not a tax on property, but a tax on that method of doing business, and because the business is being done under that legal form.*

"Mr. Brandegee: Does the Senator from Montana claim that where a State charters a corporation the United States Government can definitely impose a tax upon that corporation because it has presumed to exist under the laws of its own State?

"Mr. Carter: Well, Mr. President, unquestionably in the levying of the tax on bank circulation Congress did interpose its hand and levy a tax which operated to extinguish the banks of issue in the States" (44 Cong. Rec., 4024).

Senator Root, in his defense of the measure had placed the corporation tax on the same plane as the tax on the privilege of dealing on boards of exchange and, quoting from the opinion in *Nicol* v. *Ames* (173 U. S., 509), said:

"'* * * It is a tax upon the facility or privilege of doing business in this way.' The objection was made that the tax was one upon a sale of merchandise made in one place, to wit, in the board room, when no tax was imposed upon

> the sale of the same merchandise in another place, to wit, out of the board room. The Court said: 'That makes no difference. There is a certain facility, a certain privilege, a certain opportunity of doing this business in the way afforded by this company; and the United States can impose a tax upon that.' And they supported it" (44 Cong. Rec., 4005).

The next day, when pressed further by Senator Brandegee's questions on this point, Senator Root suggested that he would be "very glad if the Senator from Maryland [Mr. Rayner] might make a part of my answer to the question of the Senator from Connecticut" (44 Cong. Rec., 4025); and Senator Rayner, falling back on Senator Root's own words, explained the meaning of the tax as follows:

> "Mr. Rayner: This is a tax upon the privilege and the business of a corporation and the facilities of a corporation." * * *
>
> "It is a tax on the privilege and facility of a corporation. It is just as the Senator from New York said yesterday. It could not have been stated better.
>
> "Said the Senator from New York:
>
> "'It is not the profits that would be subject to the tax, but the privilege or facility of transacting the business through corporate form. It matters not from what source may come the income which is seized upon by the law as a measure for the value of the facility or privilege which is taxed'" (44 Cong. Rec., 4029).

We thus have, if it were needed, the admission of leading lawyers of both parties in the Senate that the tax was understood to be a tax on the privilege or franchise of acting in a corporate capacity.

The amendment was agreed to on July 2 (44 Cong. Rec., 4060), exactly one week from the day it had been introduced and, in the particulars quoted above, is the precise wording of the law as finally enacted except that the rate of the tax was reduced to one per centum.

No opportunity for a hearing was given to the corporations by any committee of the Senate or House of Representatives and we assert that no novel revenue measure ever passed through Congress with less scrutiny of its constitutionality. Not a single demonstration of its validity as a franchise tax was made or even attempted by any Senator. Senator Root's paragraph (44 Cong. Rec., p. 4005), skims lightly over the thinnest ice. He mentions *Veazie Bank* v. *Fenno* (8 Wall. 533) and offers no reason. Senator Rayner, misled against his instinct and his better judgment by a hasty reading of the same case, conceded without argument the vital point (44 Cong. Rec., p. 4032). Senator Brandegee and Senator Overman doubted and again and again pleaded for light and reason (44 Cong. Rec., pp. 4022–4029; 3977). No light was shed. No reason was given. Except for Senator Bristow's short speech (44 Cong. Rec., p. 4036), Senator Cummins, alone, vigorously attacked the measure as unconstitu-

tional upon the grounds we now urge (44 Cong. Rec., pp. 3977, 3978), but his argument was unheeded, unanswered and perhaps unheard. That there was no answer is not remarkable.

We do not apprehend that we can add materially to what had been said by Senators Root and Rayner on the character of the tax. It is true the law contains the words " with respect to the carrying on or doing business," but those words were merely inserted because of their similarity to words contained in Mr. Justice HARLAN'S opinion in the case of *Spreckels Sugar Refining Company* v. *McClain* (192 U. S., 397). We revert once more to the Senate debate :

> " Mr. Brandegee : * * * * I should like to ask the Senator from New York if he understands the words ' with respect to ' the transaction of their business to be equivalent to a tax imposed upon their right or privilege to transact business ?
>
> " Mr. Root : I say I think the words ' with respect to the carrying on or doing business by such corporations ' do include the meaning of the words used by the Senator from Connecticut.
>
> " Mr. Brandegee : I should like to ask the Senator also if they include anything else ?
>
> " Mr. Root : I am not prepared to say on the moment whether something more may not be found in them. I am quite sure they do not and can not include anything more than the very relation between

> the tax and the carrying on or doing of the business which the Supreme Court has declared to be lawful as a method of taxation under the Constitution, because these words are the words which the Supreme Court itself uses in declaring a tax to be lawful " (44 Cong. Rec., 4022).

Since individuals or copartnerships, though carrying on the same character of business as corporations, are exempt from the operation of the law we see that corporations are taxed not on account of the character of their business but on account of their being corporations and acting in a corporate capacity. To illustrate: The defendant corporation carries on a general retail mercantile business and is subject to all the burdens of this law, while the copartnership of Dwight Tuxbury & Sons carrying on the same kind of business, employing the same amount of capital and in the building adjoining that of the defendant corporation, is wholly exempt. The sole distinction between these two concerns is that one has a corporate charter and franchise from Vermont and does its business by virtue thereof in a corporate capacity while the other is a copartnership.

The burdens of this law, therefore, fall on the defendant corporation because it has a corporate charter and because it acts in a corporate capacity.

For persons to be a corporation and for persons to act in a corporate capacity are one and the same thing and

this thing is a corporate franchise. We take this as established beyond dispute from the language of Mr. Justice FIELD in *Home Insurance Co.* v. *New York*, 134 U. S., 594 (1890), where, in speaking of the New York tax on the "corporate franchise or business" of a corporation, he said at p. 599:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy."

But in addition to the franchise to be a corporation and to act in a corporate capacity there is, in every corporation, the so-called franchise to do the particular business for which it was incorporated. The distinction between these two franchises is quite clearly drawn by Mr. Justice CURTIS in *Hall* v. *Sullivan Railroad Co.*, 11 Fed. Cas., 257 (1857), where he points out that among the franchises of a railroad company are, first, that of being a body politic with rights of succession of members and of acquiring, holding and conveying property and suing and being sued by a certain name, and, second, to build, own and manage a railroad and take tolls thereon. That decision was quoted by this Court in *Memphis Railroad Co.* v. *Commissioners*, 112 U. S., 609 (1884), and in the latter case Mr. Justice MATTHEWS said at page 619:

> "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the fran-

> chises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

And while the franchise to do, as distinguished from the franchise to be, does not include things which may not naturally be done by individuals, the right of the corporation to do is, nevertheless, limited and defined by the terms of its charter. On this point this Court said by Mr. Justice FIELD in *Horn Silver Mining Co.* v. *New York*, 143 U. S., 305, 312 (1892):

> " A corporation being the mere creature of the legislature, its rights, privileges and powers are dependent solely upon the terms of its charter."

Thus, while the members of a corporation could, prior to their incorporation, do the things which after incorporation they do in a corporate capacity, they are limited as a corporation to doing such things or business as their charter provides.

The persons who received from the State of Vermont the charter of the defendant corporation had previously done, as individuals and a copartnership, those things

which they now do in a corporate capacity. But it is not those things that the corporation tax law touches. Were it so, the firm of Dwight Tuxbury & Sons would be within the law. The law, therefore, does not touch those natural rights which, being specified in the charter, are by virtue of permissive language in the charter sometimes termed a franchise or a secondary franchise, but it touches merely the real or primary franchise of being a corporation and acting in a corporate capacity which could be owned by the incorporators only by virtue of the charter from the State of Vermont.

The burdens of this law, therefore, falling on the defendant corporation because it has a corporate charter and because it acts in a corporate capacity are, with equal certainty, burdens upon the right to be a corporation and to act as such. This is because the court always looks through the form to the substance and effect of the tax. We quote on this point both from the opinion of this Court and from one of the dissenting opinions in *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429 (1895). In this case Chief Justice FULLER said at page 581 :

> "It is the substance and not the form which controls as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland*, 12 Wheat., 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore

void. And Chief Justice MARSHALL said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston*, 2 Pet., 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice THOMPSON and Mr. Justice JOHNSON, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice MARSHALL delivering the opinion, overruled that contention.

"So in *Dobbins* v. *Commissioners*, 16 Pet., 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California*, 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 Wall., 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the

security; and in *Cook* v. *Pennsylvania*, 97 U. S., 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S., 326, and *Leloup* v. *Mobile*, 127 U. S., 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized."

In the same case (158 U. S., 601), Mr. Justice BROWN said at page 691 :

"Thus in *Brown* v. *Maryland*, 12 Wheat., 419, a license tax upon an importer was held to be invalid as a tax upon imports; in *Weston* v. *Charleston*, 2 Pet., 449, a tax upon stock for loans to the United States was held invalid as a tax upon the functions of the government; in *Dobbins* v. *Commissioners*, 16 Pet., 435, a State tax on the salary of an office invalid, as a tax upon the office itself; in the *Passenger Cases*, 7 How., 283, a tax upon alien passengers arriving in ports of the state was held void as a tax upon commerce; in *Almy* v. *California*, 24 How., 169, a stamp tax upon bills of lading was held to be a tax upon exports; in *Crandall* v. *Nevada*, 6 Wall., 35, a tax upon railroads and stage companies for every passenger carried out of the state was held to be a tax on the passenger for the privilege of passing through the state; in *Pickard* v. *Pullman Southern*

> *Car Co.*, 117 U. S., 34, a tax upon Pullman cars running between different states was held to be bad as a tax upon interstate commerce ; and in *Leloup* v. *Mobile*, 127 U. S., 640, a similar ruling was made with regard to a license tax for telegraph companies ; and finally, in *Cook* v. *Pennsylvania*, 97 U. S., 566, a tax upon the sales of goods was held to be a tax upon the goods themselves. Indeed, cases to the same effect are almost innumerable."

We think there can be no doubt that a court which has decided that an income tax assessed against persons in respect to the interest from their holdings in municipal bonds is an unconstitutional invasion of the sovereignty of a State because affecting its power to borrow will also decide that a tax levied solely on corporations is a burden on the franchises of corporations. It must be borne in mind, moreover, that the tax of one per cent of income over $5,000 is but one of the burdens imposed upon the defendant corporation by this extraordinary law.

The burdens of the corporation tax upon the franchise of the defendant corporation are not to be likened to those taxes which States impose on corporate franchises of their own creation or on the privilege accorded to foreign corporations to do business within those States. The theory of such taxes we explain at length in the second point of this brief.

B.

State Taxation of Federal Instrumentalities.

We believe that until the year 1870 no Federal tax had been checked by this Court on the ground that it invaded the sovereignty of a State; but long before that date this Court was called on to declare and did declare that a certain State tax invaded the sovereignty of the United States. The case to which we refer is *McCulloch* v. *Maryland*, 4 Wheaton, 316, decided in 1819, and it is, as we think, the first case in which any tax, State or Federal, was declared in part unconstitutional for invading the sovereignty of the United States or one of the States. That case, while not involving a corporation tax and, therefore, not apposite in its facts to the case now before the Court, nevertheless furnishes the groundwork for the principle on which we rely. In that case the legislature of the State of Maryland on February 11, 1818, had enacted a statute providing in part, as follows:

> "*Be it enacted by the General Assembly of Maryland*, That if any bank has established, or shall without authority from the State first had and obtained, establish any branch, office of discount and deposit or office of pay and receipt, in any part of this State, it shall not be lawful for the said branch, office of discount and deposit, or office of

pay and receipt, to issue notes in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note upon a stamp of twenty cents; every twenty dollar note upon a stamp of thirty cents; every fifty dollar note upon a stamp of fifty cents; every one hundred dollar note upon a stamp of one dollar; every five hundred dollar note upon a stamp of ten dollars; and every thousand dollar note upon a stamp of twenty dollars; which paper shall be furnished by the Treasurer of the Western Shore, under the direction of the Governor and Council, to be paid for upon delivery; *Provided always*, that any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the Treasurer of the Western Shore, for the use of the State, the sum of fifteen thousand dollars."

It will be perceived that this Maryland tax was not a tax on corporations, as such, or on corporate franchises. It applied to all banks and branches of banks, whether corporations, partnerships or individual bankers, carrying on the business of banking within the State of Maryland without having received permission from the State. It was, therefore, a tax on the doing

of a banking business to the extent that such business involved the issuing of notes.

There was then in existence the Bank of the United States, chartered by an Act of Congress, and having a branch in the State of Maryland. The Bank of the United States contested the question of its liability to this tax and brought the case to this Court. Before this Court the argument of Mr. Webster, Mr. Pinkney and the Attorney General of the United States in behalf of the Bank, the argument of Mr. Hopkins, Mr. Jones and the Attorney General of Maryland in behalf of the State of Maryland, and the opinion of this Court by the Chief Justice, dwelt on two main points: first, the power of the United States to incorporate the bank and, second, the power of the State of Maryland to impose the tax on the bank. It is the second point which particularly touches the case at bar.

The Supreme Court held that Congress, for the convenient exercise of the constitutional powers of the Government, might charter a bank and that such bank, being an instrumentality of government, could not be taxed in respect to its operations by one of the States. The substance of the decision is best summarized by Chief Justice MARSHALL himself, in his later opinion in *Osborn* v. *United States Bank*, 9 Wheaton 738, where he said in speaking of the earlier case at page 859:

> "The foundation of the argument in favor of the right of a state to tax the bank, is laid in the

supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true; the bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. The whole opinion of the court, in the case of *McCulloch* vs. *The State of Maryland*, 4 W.

316, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

Returning to the report of the case of *McCulloch* v. *Maryland*, 4 Wheat., 316, we quote from the opinion of the Court. Chief Justice MARSHALL said:

"That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied" (p. 425).

"On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations" (p. 426).

"The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. * * * If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the

power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states and safe for the Union" (p. 429).

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*" (p. 431).

"If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government" (p. 432).

> " The power of taxation in the general and state governments is acknowledged to be concurrent " (p. 435).

From these quotations we draw the principle of our argument: that a State tax so far as it invades the constitutional powers and sovereignty of the United States is void and that a Federal tax so far as it invades the reserved powers and sovereignty of the States is equally void. It is quite independent of and perfectly consistent with the rule of supremacy of Federal laws made within the constitutional scope of the general Government.

It has been intimated that the opinion in *McCulloch* v. *Maryland* furnishes, in the quotation which follows, a ground of distinction between the Maryland tax on the United States Bank and the corporation tax on State corporations. The opinion says at pages 435–6:

> " It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves,

> are represented in congress and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole; between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

But immediately thereafter the opinion says:

> "But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States."

But both of these last quotations must be read in the light of the case then before the Court. The Maryland tax, as we have pointed out, was not a corporation tax. It was not a franchise tax. It was a tax on the business of banking. Hence the tax, if permitted to be levied

on the business of the United States Bank, would have been a burden on an agency of the Federal Government and a burden on the Government's constitutional powers exercised through constitutional means. The State banks, as Mr. Pinkney pointed out (p. 398), were not fiscal agencies of the States creating them and of course could be taxed by the United States by a general tax on the banking business. Moreover the Court was dealing with a case where total exemption from all State taxation on the business of the bank could properly be claimed. We are claiming no such exemption. The business of the defendant corporation in the case at bar is a purely private business like that described in the quotation from *Osborn v. United States Bank*, *supra*, and can be taxed by any Federal excise law which affects all persons and corporations doing a mercantile busines and which is, therefore, not a franchise tax. But the Court never meant to suggest that a Federal tax on banks, falling solely on those which had been incorporated, could be sustained under the general power to tax. Such a tax would not have been "*safe for the States and safe for the Union*," because it would have invaded the power of the States—not in respect to an instrumentality or agency of government but in respect to a high prerogative of State sovereignty, to grant corporate charters. The Judge who said that a State could not tax a patent granted by the United States could not have believed

that the United States could tax a charter granted by a State. The Judge who said twice in the same opinion that the taxing power of the States and the United States were concurrent (pp. 425, 435) would not have decided that a State franchise could be taxed by Congress while a United States patent could not be taxed by a State.

Although the illustration of the operation of the whole upon the part as distinguished from the operation of the part upon the whole, caught from Mr. Pinkney's argument (p. 398), bears first blush plausibility as a sketch of our duality of sovereignty, it has not controlled this Court in a single case that we have been able to find where the suggestion has been made that while the States may not burden by tax the constitutional powers of the United States the Federal Government is free to tax the reserved powers of the States. The learned Justice who made the suggestion in *The Collector* v *Day*, 11 Wallace 113 at p. 128, was in a minority of one. It was repudiated by the majority opinion in that case and we have not seen it since in any reported case except one other dissenting opinion by the same Justice. If it were controlling, the line of decisions declaring the public securities of the States and their municipalities to be beyond the reach of Federal taxation would never have been made.

The case of *Osborn* v. *United States Bank*, 9 Wheaton, 738 (1824), we have already alluded to. It involved

the right of the State of Ohio to tax the Bank of the United States for operating in that State. The *Osborn Case* followed *McCulloch* v. *Maryland*, and decided that the bank was not subject to a tax under the Ohio statute of February 8, 1819, which provided specifically that if the Bank of the United States or any other should continue to transact business in the State it should be liable to an annual tax of fifty thousand dollars on each office of discount and deposit.

The rule of *McCulloch* v. *Maryland* and *Osborn* v. *United States Bank* was also applied to the institutions chartered under the National Banking Act and protects their business from State taxation except so far as their shares may be taxed in the hands of their stockholders by express consent of Congress.

The first case of conflict of power between a State and the United States with respect to taxing public securities arose in *Weston* v. *The City Council of Charleston*, 2 Peters, 449 (1829), when a municipal ordinance of Charleston, South Carolina, provided an income tax on "all personal estate, consisting of bonds, notes, insurance stock, *six* and *seven per cent stock of the United States* * * * twenty-five cents upon every hundred dollars." This Court held that such a tax on the Government stock was void as a burden on the Government's power to borrow.

Chief Justice MARSHALL, referring to *McCulloch* v. *Maryland*, said at page 468:

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

The tax was held unconstitutional.

A case similar to the last came to this Court from New York, where the City of New York had included in an assessment against the capital of the Bank of Commerce its holdings of Government bonds. That was the case of *Bank of Commerce* v. *New York City*, 2 Black, 620 (1862). The decision, following the *Weston Case*, held the assessment void, and, the opinion by Mr. Justice NELSON, speaking for the entire Court, is so clear in the enunciation of a principle that is vital in the case at bar that we quote from it at some length:

> "The result of this doctrine is, that the exercise of any authority by a State government trenching upon any of the powers granted to the general government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to

any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power " (p. 633).

. . . . .

" The conclusive answer to the attempted exercise of State authority in all these cases is, that the exercise is in derogation of the powers granted to the general government, within which, it is admitted, it is supreme. That government whose powers, executive, legislative or judicial, whether it is a government of enumerated powers like this one, or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the general government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of

> that government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other government, 'it is a right which in its nature acknowledges no limits.' And the principle is equally true in respect to every other power or function of a government subject to the control of another" (Pages 633–4).

After quoting from Chief Justice MARSHALL'S rule which is "safe for the States and safe for the Union" Mr. Justice NELSON thus concludes on page 635:

> "Each is sovereign and independent in its sphere of action and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

In the case of *Dobbins* v. *The Commissioners of Erie County*, 16 Peters, 435 (1842), it appears by the agreed statement of facts that Captain Daniel Dobbins of the United States revenue cutter Erie had been assessed by the commissioners of Erie, Pennsylvania, for county taxes upon his office as commander of the cutter for the years 1835 to 1837 in the sum of ten dollars and seventy-five cents. It was argued in this Court that the assessment was invalid since it was on an office of the Government. This Court, by Mr. Justice WAYNE,

held the assessment void on the authority of *McCulloch* v. *Maryland* and *Weston* v. *City Council of Charleston* (both of which we have referred to), as a State tax on the constitutional means employed by the Government of the United States to execute its constitutional powers.

C.

Federal Taxation of State Instrumentalities.

Up to this point we have mentioned no case in which the taxing power of the United States has been checked for trenching upon the sovereignty of a State and although no such case seems to have come before this Court prior to 1870, expressions frequently appeared in the opinions of the Court which naturally led up to the conclusion that an invasion of State sovereignty through Federal taxation must be checked for precisely the same reason that invasion of the United States sovereignty through State taxation must be checked. Some of these expressions follow:

In *Worcester* v. *Georgia*, 6 Peters, 515 (1832) Mr. Justice McLean, said at page 570:

> "The powers exclusively given to the federal government are limitations upon the state authorities. But, with the exception of these limitations, the States are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action

of the state governments can arrest or obstruct the course of the national power."

In *Ableman* v. *Booth*, 21 Howard, 506 (1858), Chief Justice TANEY, speaking for the entire Court, said at pages 516, 519:

> "The powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." . . .
>
> "'this constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State.' The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution" (p. 519).

In the *License Tax Cases*, 5 Wallace, 462 (1866), Chief Justice CHASE, speaking for the entire Court, said at page 470:

> "But very different considerations apply to the internal commerce or domestic trade of the

States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject."

In *Pervear* v. *The Commonwealth*, 5 Wallace, 475, (1866), Chief Justice CHASE, speaking for the entire Court, said at page 479:

> " But the defense set up in the case before us is a very different one. * * * * It is founded on the general power to levy and collect taxes, *admitted on all hands to be concurrent only with the same general power in the State governments*; * * *."

In the year 1870, the case of *The Collector* v. *Day*, 11 Wallace, 113, came before this Court presenting practically the converse of the case of *Dobbins* v. *Commissioners of Erie County* (*supra*). The facts were as follows:

For the years 1866 and 1867 Joseph M. Day, Probate Judge for Barnstable County, Massachusetts, was assessed for the Federal income tax upon his salary as such judge. He paid under protest the tax for those

two years, amounting to $61.50, and brought suit against the Collector of Internal Revenue to recover back the same. The case was argued on an agreed statement of facts in the Circuit Court of the United States for the District of Massachusetts, at October term, 1869, before Mr. Justice CLIFFORD and Judge JOHN LOWELL.

The question before the Circuit Court in Massachusetts was whether the principle of the cases heretofore cited in this brief applied to Federal taxation.

From the opinion of Mr. Justice CLIFFORD (reported in 3 Clifford, 376), we discover how he disposed of the argument in favor of the right of the United States to tax the salary of the State judge and applied the principles of *McCulloch* v. *Maryland*. He said at page 388:

> " Federal officers and the instruments and means of the Federal government, it is conceded, are exempt from State taxation, but it is denied that the Federal government is subject to any such implied prohibition, even in the case before the Court, because the tax in question, it is argued, is imposed by the same people who established the offices and institutions in the States which are subjected to the burden of the controverted tax. Suppose the tax in question is imposed in the constitutional sense by the same power as that which created the offices and institutions subjected to the payment of the same, still it is not perceived

that the concession advances the argument, unless it be assumed that the offices and institutions subjected to the burden imposed are under the control of the power imposing the tax, which is the precise question in controversy between the parties." * * *

"The proposition of the defendant is in substance and effect that the States cannot tax the instruments and means of the government of the United States, because the Federal government is supreme, but that the latter may tax the instruments and means of the State governments, because, as he assumes, the States are subordinate to the United States in the same unqualified sense as the counties of a State are to the paramount authority by which they were created. Unquestionably the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, because it is so ordained in the Constitution, but the same instrument also provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people, and it is an obvious rule of construction that these two provisions must be considered together in determining the question under consideration, as they are important provisions in the same instrument, and cannot be regarded as in any respect repugnant to each other." (Page 389.) * * *

"Power to tax for State purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in Congress. Both are subject to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other. *Fifield* v. *Close*, 15 Mich., 505; *Warren* v. *Paul*, 22 Ind., 279, *Jones* v. *Keep*, 19 Wis., 369; *Union Bank* v. *Hill*, 3 Cald. (Tenn.), 325.

"Most of the powers conferred upon the government of the United States are exclusive, and it is unquestionably true that the national government in the exercise of those powers is supreme, but it is equally true that powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people, and it follows that the States in the exercise of such powers as are not delegated to the United States and are reserved to them are also supreme. Exclusive powers possessed by the United States cannot be exercised by the States, nor can the exclusive powers possessed by the States be exercised by the Federal government. They are in those respects, though exercising jurisdiction within the same territorial limits, 'separate and distinct sovereignties, acting separately and independently of each other within

their respective spheres,' just as fully 'as if the line of division was traced by landmarks and monuments visible to the eye.' *Ableman* v. *Booth*, 21 How., 516; *McCulloch* v. *Maryland*, 4 Wheat., 429; *Austin* v. *The Aldermen*, 7 Wall., 699.

"Pursuant to the Constitution, Congress may lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; and the States, subject to the prohibitions of the Constitution, express and implied, may lay and collect taxes and excises for the support of their respective State governments, and each in that behalf is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised. Unless it be so, then the States have only a permissive existence, as it is conceded that the power to tax involves the power to destroy, and that the power to destroy may defeat and render useless the power to create." (pp. 393-4.)

The case came before this Court on the appeal of the Collector of Internal Revenue, at December term, 1870, and was argued by the Attorney General of the United States on behalf of the appellant. (*The Collector* v. *Day*, 11 Wallace, 113.)

The opinion of this Court by Mr. Justice NELSON,

after asserting that the rule of *McCulloch* v. *Maryland* and *Dobbins* v. *The Commissioners of Erie* must apply, says at page 124:

> " It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or, to the people.' The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.
>
> " The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the gen-

eral government as that government within its sphere is independent of the States.

"The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County* v. *Oregon* [7 Wall. 76]. 'Both the States and the United States,' he observed, 'existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved.' Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

"Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of govern-

ment, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws." * * *

"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality * * *" (p. 126.)

The case of *The Collector* v. *Day*, remains the law and fully sustains the principle which we stated in the first part of this brief, viz: that a State tax, so far as it invades the constitutional powers and sovereignty of the United States, is void and that a Federal tax, so far as it invades the reserved powers and sovereignty of the States is equally void.

The principle is stated in *Railroad Company* v. *Peniston*, 18 Wallace, 5 (1873), in the following language at page 30:

> "There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National Government is legitimately exercised within the States. While it is true *that* government cannot exercise its power of taxation so as to destroy the State Governments, *or embarrass their lawful action*, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National Government."

This principle was applied in the case of *United States* v. *Railroad Company*, 17 Wallace, 322 (1872). In that case it appeared that the city of Baltimore

in the year 1854 had loaned to the Baltimore and Ohio Railroad Company $4,500,000 to aid in the construction of the railroad. By section 122 of the Internal Revenue Act of 1864, as amended in 1866, it was provided that railroads (and various other companies) should pay out of earnings five per cent. on interest or coupons, dividends, etc. Under this law the United States demanded five per cent. out of the interest payable to the City of Baltimore on its loan. This Court, affirming the decision of the Court below, held that this tax could not lawfully be imposed on the City of Baltimore. By Mr. Justice HUNT the Court said at page 327:

> "The creditor here is the city of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.
>
> "There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This

carries with it an exemption of those agencies and instruments from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other."

The principle has also been applied to exempt municipal bonds from Federal taxation. In *Mercantile Bank* v. *New York*, 121 U. S., 138 (1886), Mr. Justice MATTHEWS said at page 162:

> "Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States * * * ."

The same principle made the income of municipal bonds free from the income tax of 1894.

> *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S., 429 (1895), at pages 583–586, 601–603, 652, 653–4.

And in the case of *Plummer* v. *Coler*, 178 U. S., 15, (1900), these last cases are cited and quoted in such manner as to show beyond all doubt that this Court now regards as completely reciprocal this re-

straint upon the general government and the States. In that case Mr. Justice SHIRAS said at page 117 :

> " It is not open to question that a State cannot, in the exercise of the power of taxation, tax obligations of the United States. *Weston* vs. *Charleston*, 2 Pet., 449; *Bank of Commerce* vs. *New York City*, 2 Black, 620; *Home Insurance Co.* vs. *New York*, 134 U. S., 594, 598.
>
> " So, likewise, it is settled law that bonds issued by a State, or under its authority by its public municipal bodies, are not taxable by the United States. *Mercantile Bank* vs. *New York*, 121 U. S., 138; *Pollock* vs. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 583.
>
> " The reasoning upon which these two lines of decision proceed is the same, namely, as was said by Mr. Justice NELSON in *Collector* vs. *Day*, 11 Wall., 113, 124: 'The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme: but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, " reserved," are as independent of the general government as that government within its sphere is independent of the States;' and, as was said by Mr. Chief Justice FULLER, in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S.,

537: 'As the States cannot tax the powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.'"

D.

'HER CASES OF INVASION OF SOVEREIGNTY THROUGH TAXATION.

Lands owned by the United States are exempt from ıte taxes, as was held by this Court in *Van Brocklin Tennessee*, 117 U. S., 151 (1886). In *Ambrosini United States*, 187 U. S., 1 (1902), it was held that stamp tax required by the War Revenue Act of the ited States of 1898 could not be imposed upon a d required by the State of Illinois as a condition to granting of a license to sell intoxicating liquors. hat case this Court, speaking by Chief Justice FUL-, said at page 7:

"The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assume the power to suppress such action. And considering license and bond

> together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of State and of City, as authorized by the State, to insure the public welfare in the conduct of the business, although the business itself was not governmental."

The opinion in the case last cited refers to a number of decisions as authority, among them *Bettman* v. *Warwick*, 108 Fed. Rep., 46, decided by the United States Circuit Court of Appeals for the Sixth Circuit. In that case it was held that it was not within the power of Congress to require a revenue stamp to be put on a bond given by a notary public as a condition of his appointment to office by a State. The opinion by Mr. Justice LURTON, then Circuit Judge, concurred in by Mr. Justice DAY, then Circuit Judge, and by Judge SEVERENS, completely upholds the mutuality of the restraints upon the taxing powers of the National and State governments against invading the sovereignty of each other.

E.

STATE TAXATION OF UNITED STATES PATENTS.

We next take up the subject of patents, the right to create and preserve which is vested by the Constitution

in the United States. Patents had their origin in royal grants as a part of the prerogative of the crown (*The Queen* v. *County Court Judge of Halifax* [1891], 1 Q. B., 793; s. c. affirmed [1891] 2 Q. B., 263; 1 *Robinson on Patents*, Sections 1, 10), and before the adoption of the Constitution were and still may be granted by the several States out of their own sovereignty (Chancellor KENT. in *Livingston* v. *Van Ingen*, 9 Johnson, 507 [1812], at pages 528, 530–1). In *McCulloch* v. *Maryland* Chief Justice MARSHALL, in a part of the opinion already quoted, scouted the idea that a State might tax a patent-right granted by the general government. He classed it with the mint and the custom house. It has been assumed in later decisions of this Court that a Federal patent-right could not be taxed by a State.

Patterson v. *Kentucky*, 97 U. S., 501, (1878).
Webber v. *Virginia*, 103 U. S., 344 (1880).
Allen v. *Riley*, 203 U. S., 347 (1906).

In other courts the point has been expressly adjudicated.

In re Sheffield, 64 Fed. Rep., 833 (1894).
Commonwealth v. *Westinghouse Mfg. Co.*, 151 Pa. St., 265 (1892).
The People ex rel. Edison Co. v. *Board of Assessors*, 156 N. Y., 417 (1898).

And the decisions are placed, not on the ground that the making of the patented article or the vending of the patented article, or that the patented article itself is a means, instrumentality or agency of the United States,

but on the ground that the article derived its right to be a patented article from a grant or franchise from the United States. A patent is a franchise. The words of Chief Justice TANEY, in delivering the opinion of this Court in *Bloomer* v. *McQuewan*, 14 Howard, 539 (1852), make our meaning clear. He said at page 549:

> "The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent. And when he sells the exclusive privilege of making or vending it for use in a particular place, the purchaser buys a portion of the franchise which the patent confers. He obtains a a share in the monopoly and that monopoly is derived from, and exercised under, the protection of the United States."

And as Mr. Justice CLIFFORD said in the case of *Seymour* v. *Osborne*, 11 Wall., 516 (1870), at page 533:

> "Inventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted."

The whole subject of the origin and nature of a patent was quite fully discussed in the case of *The*

Queen v. *County Court Judge of Halifax* (*supra*). That was an application for a writ of *mandamus* to require the respondent, as judge of the county court, to take jurisdiction of a suit for infringement of patent. He had declined to do so on the ground that the County Courts Act provided that such courts should not have cognizance of "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or *franchise*, shall be in question." In the Court of Queen's Bench Baron POLLOCK said:

> "The right of the Crown to grant letters patent to a person for the sole use of any art first invented by him is a part of the ancient royal prerogative" (1 Q. B. [1891] p. 796).

Then reviewing the authorities for the definition of "franchise" (*Id.*, p. 797–8), he thus concluded:

> "The result of these authorities is, in our opinion, that 'franchise' does include such a right as was put in issue by the proceedings in the county court" (*Id.*, p. 798).

Upon appeal Lord ESHER, Master of the Rolls, said:

> "I agree with the judgment of the court below for the reasons that they gave, and I am prepared to say that the term 'franchise' in the County Court Act, 1888, includes a privilege granted by the Crown in respect to its prerogative, and that so a grant of a patent comes

within the exception, and the power of the county court to try a case involving the title to a patent is ousted by it." (2 Q. B. [1891], p. 266).

So also Lord Justice LOPES:

"In the second volume of Blackstone's Commentaries under the heading 'franchises' I find 'franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject.' This would remove any doubt that I had, whether the term franchise included a patent, and if the case had to be decided merely on the construction of the County Courts Act, 1888, I think the jurisdiction of the county court would be excluded." (*Id.*)

Of course, by the Federal franchise of the letters patent the patentee gets no new right to make or vend the article embodying his invention. That right he has before the patent is applied for or granted. It is his natural right. As this Court, by Mr. Justice HARLAN, said in *Patterson* v. *Kentucky* (97 U. S., 501), at page 506:

"The right to sell the Aurora oil was not derived from the letters-patent, but it existed and could have been exercised before they were issued, unless it was prohibited by valid local legislation. All which they primarily secure is the exclusive right in the discovery."

It has therefore always been held that the mere fact that articles had been patented by a United States patent did not prevent the States from including the sale of such articles in their ordinary police or license regulations. That was the decision in the case last cited and also in the case of *Webber* v. *Virginia* (*supra*), and other cases following it.

It has been suggested that taxing a Federal patent differs from taxing a State corporate franchise, because the States granted to the Federal Government the power to issue patents, and therefore may not destroy the value of that grant by taxing the patents, while, on the other hand, the States retained their right to grant corporate franchises but subject to the general power of taxation which they had conferred on the Government. That is a perverted argument. It involves a breach of faith with the States and a violation of the compact under which the union was formed, and amounts to saying that what the States granted to the general government belongs to the latter by express grant, while what was reserved by the States may be wrested from them by the general government through the power to tax.

The exemption of Federal patent-rights from State taxation has a very significant bearing on this case. Suppose, for example, that the State of Vermont should enact a law providing that every person, firm or corporation owning any United States letters-patent should

pay a tax with respect to the carrying on or doing of any business protected by such letters-patent equivalent to one per cent. of the net income of such business. The State of Vermont would attempt to defend the statute on the ground that the State had the right to classify for purposes of taxation; that it had selected as a class certain favored persons and corporations who enjoyed Government monopolies; that the class so selected was, by reason of the monopolies enjoyed, well able to pay and that the tax was light. On behalf of the Government it would be answered that the power to grant patents was a constitutional power of the United States; that a tax upon a Federal patent was a tax upon a franchise granted by the United States out of its sovereignty, and therefore a tax upon a constitutional power of the general government and an invasion of its sovereignty, and that though the tax was light, the power to tax at all, if once admitted, would involve in the assessment of a heavier tax the power to destroy and to render useless the power to create.

There can be little doubt as to how this Court would decide such a case. We think there should be as little doubt if the conditions were reversed and the Court had before it the case of a Federal tax upon a State patent or State corporate franchise.

F.

State Taxation of a Federal Corporate Franchise.

We now pass to another sort of franchise—the franchise to be a corporation and to act in a corporate capacity. Like the franchise of letters-patent, it comes to the citizen or subject as a crown prerogative or a prerogative of sovereignty. "The king has also the pre-"rogative of conferring privileges upon private persons. "* * * Such also is the prerogative of erecting cor-"porations; whereby a number of private persons are "united and knit together, and enjoy many liberties, "powers and immunities in their politic capacity "which they were utterly incapable of in their "natural." (1 Bl. Com., Ch. 7, pp. 272–3.) "The "king's consent is absolutely necessary to the erec-"tion of any corporation, either impliedly or expressly "given. * * * The methods, by which the king's "consent is expressly given, are either by act of parlia-"ment or charter" (1 Bl. Com., Ch. 18, 472–3). "Fran-"chise and liberty are used as synonymous terms, and "their definition is, a royal privilege, or branch of the "king's prerogative, subsisting in the hands of a sub-"ject. Being therefore derived from the crown, they "must arise from the king's grant * * *. The "kinds of them are various. * * * It is likewise "a franchise for a number of persons to be incorporated

" and subsist as a body politic; with a power to main-
" tain perpetual succession and do other corporate acts.
* * * " (2 Bl. Com., Ch. 3, p. 37).

" Franchises," said Chief Justice TANEY in *Bank of Augusta* v. *Earle*, 13 Peters, 519 (1839) at page 595, "are special privileges conferred by government
" upon individuals, and which do not belong to the
" citizens of the country, generally, of common right.
" It is essential to the character of a franchise that it
" should be a grant from the sovereign authority, and
" in this country no franchise can be held which is
" not derived from a law of the State."

In view of the settled law that a State might not tax the franchise of letters patent granted by the United States, and in view of the fact that corporate franchises, like patent franchises, are granted out of sovereignty, it was inevitable that this Court should unanimously hold, when the great case of *California* v. *Central Pacific Railroad*, 127 U. S., 1, came before it, that the States were utterly without power to tax a corporate franchise granted by the United States. Defenders of the " corporation tax " have sought to lessen the scope of Mr. Justice BRADLEY'S great opinion in that case by saying that it turned on the fact that the railroad was a federal agency and not on the fact that the tax was laid on a federal franchise. There is no justification for this. There is not a line or a word in the whole opinion that

gives color to that statement. The entire decision was placed upon the ground that the franchise "emanates "from, and is a portion of, the power of the government "that confers it. To tax it, is not only derogatory to "the dignity, but subversive of the powers of the gov- "ernment and repugnant to its paramount sovereignty" (127 U. S., 41). Justice BRADLEY did mention the public or national utility of the corporation, but the mention of that feature was quite subordinate to the main issue, and beside the real question of the power of the State to tax the franchise. Long before that case came before this Court it had been recognized that every great transcontinental railroad performed Government service in the transportation of mails, troops, etc., and was an instrumentality, to that extent, of the United States, and in establishing the fact that such a railroad was an instrumentality of the United States, it made not the slightest difference whether the railroad was chartered by the United States or one of the States. It would have been, therefore, a sheer waste of time for this Court to have pointed out in *California* v. *Central Pacific Railroad*, that the railroad had been chartered by the United States if the Court regarded the railroad as an instrumentality of the United States like the Bank of the United States, the National banks, the Government stocks and the Captain of the revenue cutter.

We have said that it was recognized that all trans-

continental railroads were carrying troops, mails, etc., and were to that extent, instrumentalities of the United States, and that it made no difference as to the power of the State to tax the property of such railroads whether they were incorporated by the United States or by a State. In support of this we quote from the opinion of this Court in *Railroad Company* v. *Peniston*, 18 Wallace, 5. Mr. Justice STRONG said at pages 33, 34 :

> " A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad." * * *
>
> " It is, however, insisted that the case of *Thompson* vs. *The Union Pacific Railroad Company* differs from the case we have now in hand in the fact that it was incorporated by the Territorial legislature and the legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from

this to distinguish the case from *McCulloch* vs. *The State of Maryland*. But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of National powers. As was said in *Weston* vs. *Charleston*, they cannot, by taxation or otherwise, 'retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a State legislature."

Mr. Justice STRONG, however, was careful to point out that the tax there under consideration was "*not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being*" (p. 37). The same rule has been followed in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S., 530 (1888), in which Mr. Justice MILLER incidentally pointed out (p. 549) that all railroads had been declared to be gov-

ernment post-roads. When, therefore, the case of *California* v. *Central Pacific Railroad*, 127 U. S., 1, came before this Court, it was settled law that property taxes on railroads employed as Federal agencies could be levied by the States irrespective of whether such railroads were chartered by the United States or by the States and the only questions before the Court were whether the State tax in that case was laid on a Federal franchise, and, if so, whether it could be lawfully laid. It appeared by Article XIII, section 10 of the Constitution of California, that "the franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization * * *." This language was followed by the legislature of California in framing section 3628 of the Political Code. The Central Pacific Railroad Company claimed that the State Board of Equalization had included in assessments against the company the value of the franchise or franchises granted to it by the United States and expressly alleged it was a Federal corporation holding its corporate power and franchises under the government of the United States. The Court below found that the assessment did include "the full value of *all* franchises and corporate powers exercised by the defendant."

Mr. Justice BRADLEY, after stating the Acts of Congress which related to the building of the Central Pacific Railroad or its predecessor, found that the Company possessed franchises granted by Congress. He

thus disposed of the question whether the State may tax them (Pages 40–1):

> "Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Com., 37. Generalized, and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always reduced by the laws and customs of the community. Under our system their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the

legislature, direct or derived. These are franchises. No private person can take another's property even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* vs. *Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject."

The foregoing extract from Mr. Justice BRADLEY'S opinion was quoted in full and with approval by this Court in the case of *Central Pacific Railroad* v. *California*, 162 U. S., 91 (1896) at pages 124–5, and it would seem to be settled law that a State cannot tax a franchise granted by the General Government.

G.

FEDERAL TAXATION OF A STATE CORPORATE FRANCHISE.

We now pass to the precise question before this Court in the case at bar: May Congress impose a tax on a corporate franchise granted by a State?

We have shown that the granting of charters and franchises to corporations is a prerogative of the crown. Being such, it is owned by the States, as this Court, speaking by Mr. Justice MCLEAN, said in the case of *Wheeler* v. *Smith*, 9 Howard, 55, 78 (1850):

> "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal government."

Let us now consider some of the cases which may be cited on the side of the corporation tax. First is the case of *Veazie Bank* v. *Fenno*, 8 Wallace, 533

(1869). A dictum in *Veazie Bank* v. *Fenno* is the only authority referred to in the Senate debates as upholding the novel principle of this extraordinary tax. The decision in that case went upon the ground that to the United States belongs complete control over currency.

The Veazie Bank was a Maine corporation and had authority to issue bank notes for circulation. The Act of Congress of July 13, 1866, provided that

> "Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue" (p. 539.)

The bank claimed that this law was unconstitutional on two grounds. The second was that "the act imposing the tax impairs a franchise granted by the State and Congress has no power to pass any law with that intent or effect" (p. 540); and the Court says at page 547:

> "Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

"We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property."

Consider the statute there before the Court. It was not a corporation tax. It was not aimed at corporations or payable by them because they were such. It included among those liable to pay the tax all banks—partnerships as well as incorporated companies (14 Op. Atty. Gen. 373)—and it was not levied on the banks or bankers in respect to their business as a whole or their franchise, right or privilege to do business. It was levied on property and affected a single thing that all banks and bankers had been accustomed to do, viz., to issue notes for circulation, whether such notes were the banker's own or those of some other person or bank. This feature was

perfectly understood by the Court and was dwelt upon, for Chief Justice CHASE said at page 547:

> "But in the case before us the object of taxation is *not the franchise* of the bank, *but property created, or contracts made and issued under the franchise, or power to issue bank bills.* A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts."

And on pages 546–7:

> "The tax under consideration is a tax on bank circulation."

The dissenting Justices, Mr. Justice NELSON and Mr. Justice DAVIS considered that this tax upon bank circulation was equivalent to a tax on the reserved power of the States to create banks and therefore unconstitutional, and Mr. Justice NELSON said at page 555:

> "As we have seen, in the forepart of this opinion, the power to incorporate banks was not

surrendered to the Federal Government but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them."

And on page 556:

"It is true, that the present decision strikes only at the power to create banks, but no person can fail to see that the principle involved affects the power to create any other description of corporation, such as railroads, turnpikes, manufacturing companies, and others.

"This taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the government, or in the opinions of the illustrious statesmen who founded it. These statesmen scrupulously abstained from any encroachment upon the reserved rights of the States; and. within these limits, sustained and supported them as sovereign States."

These quotations, involving principles which we now urge, were not, we submit, denied by the majority

of the Court in *Veazie Bank* v. *Fenno.* The majority opinion expressly states that the tax was not on the franchise of the bank and admits that there may be cases in which a tax on a franchise granted by a State must be held unconstitutional, and that the reserved power of the States to pass laws *and to give effect to them through executive action* is beyond the reach of Federal taxation. That concession comes very nearly covering, if not quite covering, the case at bar. Surely the assertion that the Court cannot admit "that franchises granted by a State are necessarily exempt from taxation" does not necessarily include the franchise to create a corporation through the exercise of a crown prerogative. It may well be that such a franchise as the right of an individual or a firm or corporation to issue circulating notes as currency may not be exempt from Federal taxation any more than the right to buy and sell on the floor of an exchange or the right to transmit an estate by will or to take title under a will; but when the Court expressly states that the tax is not upon the franchise of the bank, *i. e.* the franchise to be a corporation and to act in a corporate capacity, we insist that no legitimate use of the case can be made as a precedent for the validity of the corporation tax of 1909.

The latter part of the opinion of the Court in *Veazie Bank* v. *Fenno* shows that the statute there under discussion may be sustained on the strength of the Govern-

ment's power to regulate currency. That this is probably regarded as the true ground of the decision may be gathered from the opinion of this Court in the *Head Money Cases*, 112 U. S., 580 (1884), where Mr. Justice MILLER, speaking for the entire Court, said at page 596:

> "In the case of *Veazie Bank* v. *Fenno*, 8 Wall., 533, 549, the enormous tax of eight per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

So far as we have been able to ascertain, the case of *Veazie Bank* v. *Fenno* has never been referred to by this Court as sustaining the power of the United States to tax a State franchise to be a corporation.

It has been suggested that section 122 of the Internal Revenue Act of 1864, as amended in 1866, affords a precedent for the corporation tax of 1909 and the decision of *Railroad Company* v. *Collector*, 100 U. S. 595 (1879) is referred to as sustaining the tax which was to be paid by "any railroad, canal, turnpike, canal navigation or slack water company." It is true

that individuals and partnerships were not mentioned by name in that section, but it is also the fact that the word "corporation" is not used. The Court seemed to think the tax an ordinary occupation tax on particular businesses.

The case of *Railroad Company* v. *Collector*, is not a precedent for the corporation tax of 1909. The statute there in question (Section 122 of the Internal Revenue Act of 1864, as amended in 1866) provided that the companies named must deduct from the payment on account of interest on bonds and of dividends on stock a tax on such interest and dividends, and the single question presented to this Court was whether this tax could be collected when the bondholders and stockholders were aliens. None of the constitutional questions arising in the case at bar was mentioned or even suspected of being involved in *Railroad Company* v. *Collector*. That the case is of no value in the present discussion appears from the first paragraph of the opinion where Mr. Justice MILLER says at p. 596:

> "As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, *the case is of little consequence as regards any principal involved in it as a rule of future action.*"

It is also important to notice that this Court in the case of *United States* v. *Railroad Company*, 17 Wall., 322, held that the tax imposed by the law under consid-

eration in *Railroad Company* v. *Collector*, 100 U. S., 595, was not a tax upon the corporation. In the headnote of the case it said that:

> "The tax provided for in the 122nd section of the Internal Revenue Act of June 30th, 1864, as subsequently amended * * * is a tax upon the creditor and not upon the corporation. The corporation is made use of, but as a convenient means, of collecting the tax."

It is not clear whether the construction of this statute of 1864 entertained by this Court in the case in Wallace is to prevail or the subsequent construction in the case decided in 100 U. S., but it is interesting to note that the subsequent case of *Railroad Company* v. *Collector*, 100 U. S., 595, makes no mention in the opinion of the prior case of *United States* v. *Railroad Company*, 17 Wall., 322.

The remarks on this case of *Railroad Company* v. *Collector* by Mr. Justice BRADLEY and Mr. Justice HARLAN (106 U. S., 703), as well as a dissenting opinion by Mr. Justice FIELD (106 U. S., 330–1), coupled with Mr. Justice MILLER'S observations, already quoted, leave the case of *Railroad Company* v. *Collector* as no authority on any proposition.

Another case which has been thought pertinent by supporters of the corporation tax is *Nicol* v. *Ames*, 173 U. S. 509 (1899), where this Court upheld that provision of the War Revenue Act of 1898 requiring a mem-

orandum of every sale at any exchange or board of trade or other similar place and the affixing of a revenue stamp to such memorandum. The Court, after holding that such tax was not a direct tax, held that sales of that sort could be classified by themselves and apart from other sales and could therefore properly be selected for a special tax because of the obvious and peculiar privilege and facility of making a sale at a place where there was the best opportunity for a demand, a price, and dispatch in the transaction of business. It was conceded, however, that the privileges and facilities of exchanges were not created by the State, and, therefore, were not, in any sense, franchises created out of a crown prerogative. And in the opinion of the Court in *Nicol* v. *Ames*, Mr. Justice PECKHAM suggestively said at page 521:

> "If it were to be assumed that taxes upon *corporate* franchises or privileges may be imposed only by the authority that created them, it does not follow that *no* privilege or facility can be taxed which is not created by the government of a State or by Congress."

We may therefore dismiss *Nicol* v. *Ames* as an authority in support of the corporation tax.

We shall next proceed to discuss the acknowledged power of Congress to tax the transmission of property under the State laws of wills and intestacy. The recognition of this power has been referred to as an argu-

ment to support a Federal tax on corporate franchises. The error arises from a failure to distinguish between the origin, ownership, transmission and receipt of property, on the one hand, and the creation of a corporation on the other.

Blackstone's chapter "of Property in General" (2 Bl. Com. Ch. I, p. 1) gives the origin of property. In the beginning all things were in common and the only property which an individual had therein was a kind of a transient property which, while he used the particular thing, was his by "the law of nature and reason." (*Id.*, p. 3.) When he left it, the thing became transiently the property of the next taker. "As mankind increased in numbers, craft and ambition it became necessary, in order to avoid innumerable tumults, to entertain the conception of more permanent dominion over things." (*Id.*, p. 4.)

> "And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and meliorated by the bodily labour of the occupant: which bodily labour, bestowed upon any subject which before

lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein." (*Id.*, p. 5.)

"And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which excludes every one else but the owner from the use of it." (*Id.*, p. 8.)

"Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it. * * *" (*Id.*, p. 9.)

Then mutual convenience introduced commercial traffic and transfer of property.

On the death of a person his property became that of the next immediate occupant, but for the peace of mankind "the universal law of almost every nation" has given to the dying person the right of disposing of his property by will, or, in case he makes no will, has declared who shall be his heir or successor (*Id.*, p. 10).

The right of children to inherit seems to have been recognized earlier than the right to make a will (*Id.*, p. 11), and the origin of their right to inherit seems prob-

ably to have arisen from their being naturally the persons who would be near their father's death-bed and therefore the next immediate occupants of his possessions (*Id.*, 11–12). In default of children a man's servants born under his roof become his heirs (*Id.*, p. 12). But the strict rule of inheritance made heirs disobedient and headstrong, defrauded creditors and sometimes prevented the wisest provision for the support of children. This caused the introduction of wills (*Id.*, p. 12).

In *United State* v. *Perkins*, 163 U. S., 625 (1876), this Court, by Mr. Justice BROWN, said at page 628:

> "* * * the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents. * * *"

And in *Windham* v. *Chetwynd*, 1 Burr., 414 (1757), LORD MANSFIELD said at page 420:

> "Let me observe that the power of devising ought to be favored.
>
> "It is a natural consequence of property, and the right a man has over his own."

The foregoing citations are sufficient to show that property does not proceed from a sovereign power, nor is it created out of a crown prerogative. It is enjoyed by persons as a natural right. The right of disposing of it by will and inheriting it are also spoken of as

natural rights, though provided for and regulated by laws just as are the owning, sale and purchase of property. The State may say that the provisions of a man's will shall be respected and the State may say who are the heirs, but the State does not create the property which is transmitted. The transmission is occasioned by death and is not created by the State. The transmission would have occurred without any laws for wills or inheritances and the property would have gone by the old doctrine of occupancy to the first takers. There has never been any theory that upon a man's death his property dissolves, is absorbed by sovereignty and is re-created by sovereignty and vested in somebody else.

The transmission of property on the occasion of the owner's death, being an inevitable occurrence, can be taxed to any extent by the United States without preventing the transmission. The transmission arises from natural causes which are not controlled or regulated by governments and it is always bound to occur whatever the tax and by whomsoever the tax is imposed. On the other hand, corporate franchises are government creations; they may easily be taxed to extinction, and the granting of franchises may easily be prevented by the mere enactment of a tax statute.

If it were maintained that the transmission of a decedent's property was beyond the reach of Federal taxes

because regulated by State laws it would follow that property generally, since it is regulated in its ownership, use, sale, exchange and purchase by State laws, must also be beyond the reach of such taxes. This was the view taken by this Court in *Knowlton* v. *Moore*, 178 U. S. 41 (1900), and the subject was thus disposed of by Mr. Justice WHITE at page 59:

> "But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus,

imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate."

It is therefore held that the transmission of property through the death of its former owner, like the owning, buying and selling of property, is alike within the taxing power of the United States though within State regulation. It brings the transmission of a decedent's property to the same basis as the circulation of negotiable notes as currency, the selling of property, the trafficking in commodities at exchanges and boards of trade and all other privileges or rights which, though exercised under the permission and regulation of the States, may still be taxable by the United States. There is a perfectly clear distinction between a Federal tax on the doing of a thing with or in respect to property which the State did not create and a Federal tax on a corporate franchise created and granted out of State sovereignty.

In *Thomas* v. *United States*, 192 U. S., 363 (1904) the plaintiff in error had been indicted for omitting to stamp a memorandum of sale of some railroad stock as required by the War Revenue Act of 1898. He was convicted and appealed to this Court. The argument in this Court and the decision turned solely upon the question whether the requirement of affixing to the memorandum a revenue stamp imposed a "direct tax." This Court held that the tax was not a direct tax but an excise tax upon the sale, and the Court by the Chief Justice said at page 371:

> "The sale of stocks is a particular business transaction in the exercise of the privilege

afforded by the laws in respect to corporations of disposing of property in the form of certificates."

The case is, therefore, brought within the principle of the other cases where taxes have been imposed on the opportunity or privilege of doing some particular thing with or in respect to property such as issuing negotiable notes as currency, selling at exchanges or boards of trade, transmitting by will or through intestacy, etc. It was not argued and could not have been argued that the tax was a tax on a corporate franchise and the tax was not even limited to shares in corporations but included shares in "any association, company or corporation." Therefore every enterprise or property where separate interests were represented by shares was affected alike.

There is nothing in the case of *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397 (1904), which supports the constitutionality of the corporation tax. That case arose under section 27 of the War Revenue Act of 1898, which provided "that *every person, firm, corporation or company* carrying on or doing the business of . . . refining sugar" should pay an annual excise tax equivalent to a certain per cent of the gross receipts. The tax was an ordinary occupation tax and the statute imposing it named the occupations taxed and imposed the tax on all persons engaged in such occupations. It

was argued that the tax was a direct tax on income. This Court held it to be an excise tax on a particular business and quite in line with *Pacific Insurance Co.* v. *Soule*, 7 Wallace, 433. The Corporation Tax Law mentions no particular business except insurance.

In *South Carolina* v. *United States*, 199 U. S., 437 (1905), it was held that the State dispensaries of South Carolina, although established by the laws of that State and authorized by the State as the sole dispensers of intoxicating liquors, must pay the internal revenue taxes imposed by the United States on liquor dealers. While not referred to in the opinion of the Court, the case of *Bank of the United States* v. *Planters' Bank*, 9 Wheaton, 904 (1824), was cited on the argument by the Solicitor General of the United States. In that case Chief Justice MARSHALL said at page 907:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates, and to the business which is to be transacted."

This reasoning seems very near that of the Court

in the *South Carolina Case*, for Mr. Justice BREWER says at page 463 :

> " It is reasonable to hold that while the former [the United States] may do nothing by taxation in any form to prevent the full discharge by the latter [a State] of its governmental functions, yet whenever a State engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the Nation."

Suggesting a similar line of thought Mr. Justice BREWER also said in the *South Carolina Case* at page 461 :

> " These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

By " these decisions " the Court meant the *Veazie Bank Case*, *The Collector* v. *Day*, *United States* v. *Railroad Company* and the *Ambrosini Case*, all of which have been discussed in this brief. Those cases are the only ones which the Court had immediately referred to in that connection. There is, therefore, no reason to suppose that the language of Mr. Justice BREWER was intended in any way to affect the rule exempting United

States letters-patent or United States corporate franchises from State taxation. That being so, the *South Carolina Case* expressly omits to touch the cases which are especially in point in the case at bar. Moreover, if we take the words of the Court "of a strictly governmental character" we would assume that they would as aptly fit the function of creating a corporation out of a crown prerogative as they would the appointment and payment of a judicial officer, the borrowing of money for public purposes, or the taking of a bond under the police power. The exercise of the crown prerogative in creating corporations is, we take it, one of the "ordinary functions" of State government, and we gather from the opinion of the Court that such functions are not to be trenched upon by Federal taxation. For the Court says at page 451 :

> "But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. * * *
>
> "Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the *ordinary functions* of government, * * *"

And as Mr. Justice BROWN, speaking for this Court in *Hale* v. *Henkel*, 201 U. S., 43, said at page 74 :

> "The corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public."

But there are further and very wide distinctions between the *South Carolina Case* and the corporation tax on the Stone Tracy Company.

The tax was laid on the South Carolina dispensaries not because they were empowered by the State, but because they dealt in liquors. The Corporation Tax Law falls upon the Stone Tracy Company because it is empowered by the State and not because it does a general mercantile business. In the *South Carolina Case* the tax was not upon the power of South Carolina to create the State dispensaries. In the case at bar the tax is upon the power of Vermont to grant and preserve a franchise to the defendant corporation. If, through lax enforcement of the South Carolina liquor laws, persons other than State agents sell liquor in South Carolina, such persons are required to pay the United States liquor taxes. On the other hand, in Vermont, individuals and partnerships engaged in the same business as the Stone Tracy Company are not subject to the corporation tax because they are not chartered by Vermont. We have but to refer to the official report in the *South Carolina Case* to find that in spite of the State statute confining the sale of liquors to the State dispensaries, the United States liquor taxes were collected from two hundred and sixty private dealers in the State. It is therefore clear that the two cases are not parallel, and that the principle of the *South Caro-*

lina Case is merely that a State, by entering the field of private business and engaging in a trade which has always been taxed by the United States, cannot use its sovereignty to avoid the tax which others in the same State and in other States are required by ancient Federal statutes to pay as a license on such trade.

To use the language of Mr. Justice WHITE in giving the opinion of the Court in a later case (*Murray* v. *Wilson Distilling Co.*, 213 U. S., 151, 173): "That case [*i. e.* the *South Carolina Case*] was concerned with the power of a State, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a pre-existing right of taxation possessed by the Government of the United States."

The United States had always taxed the liquor business, and the tax had historic practice to support it. Moreover the claim of the dispensaries was that they were entitled to total exemption. In the case at bar no claim of total exemption is made. The Stone Tracy Company may be taxed under any Federal tax law which does not make the corporate franchise the test of liability. We fail to perceive any just ground for the claim that the *South Carolina Case* is an authority for the Corporation Tax.

We cannot be criticised for producing no case in which a Federal tax upon corporate charters has been declared unconstitutional, because until the enactment of the

extraordinary law now under consideration no such tax has been imposed by Congress. In one hundred and twenty-two years of legislation under the Constitution the Corporation Tax of 1909 is the first of its kind.

While we can produce no decision, we have shown the principle underlying all the decisions respecting infringement by taxation upon the sovereignty either of the Nation or of the States, and that principle as clearly forbids a Federal tax upon the States' exercise of crown prerogatives as it does a State tax upon a Federal franchise. If we run through the cases decided by this Court we find expressions, not decisions, it is true, but expressions indicating that in American jurisprudence the power to tax a corporate franchise rests only with the State which creates it. Thus: where Mr. Justice WOODBURY, in a concurring opinion (6 Howard, at page 548), spoke of a corporate franchise as a contract between the State and a corporation which "may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it"; where Mr. Justice SWAYNE said (15 Wallace, at page 296) that it was "not to be questioned that the States may tax the franchises of companies *created by them*"; where Mr. Justice BRADLEY (21 Wallace, at page 473) spoke of the "very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises,

and its corporations;" where Mr. Justice JACKSON, then Circuit Judge (52 Fed. Rep., at pages 112–3) spoke of the right of Congress to place restrictions upon the rights of corporations created by its authority as distinguished from corporations created by the States; or where the precise point was conceded for argument's sake in the opinion of Mr. Justice PECKHAM in *Nicol* v. *Ames*, already quoted.

And, though found in a dissenting opinion, we think the language of Mr. Justice BREWER in speaking for himself and the late Chief Justice accurately reflects the principle. He said:

> "It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority."
>
> *Hale* v. *Henkel*, 201 U. S., 43, 86.

We have shown, beyond the possibility of dispute, we think, that the burdens of the Corporation Tax Law fall on the franchise of the defendant corporation and on the franchise of every corporation. It follows irresistibly from this that the law puts the burden on the power of the States to create corporations. The mere phraseology used in the statute—"special excise tax with respect

to the carrying on or doing business"—counts for little as against the substance and effect when the constitutionality of the law is attacked.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S., 429, 580–1 (1895).
Knowlton v. *Moore*, 178 U. S., 41, 81 (1900).
Spreckels Sugar Refining Co. v. *McClain*, 192 U. S., 397, 411 (1904).

As Chief Justice MARSHALL said:

> "Is the proposition to be maintained, that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing?"
>
> *Craig* v. *Missouri*, 4 Peters, 410, 433 (1830).

So we cannot believe that this Court will permit the plain language of the Tenth Amendment to the Constitution to be evaded by a device which clothes an invasion of State sovereignty in a new name.

We submit that among the "ordinary functions" of State government is the creation of corporations, and that the exercise of a prerogative of sovereignty in creating them is "strictly governmental". If it is not essential to the existence of the States in the measure of independence guaranteed them

by the Constitution that this function should remain unimpaired, it is for the States so to decide in a constitutional manner. Possibly, on the submission of a constitutional amendment giving Congress power to tax the franchises of State corporations, the States might grant it, but until they do so it is not consistent with our frame of government and duality of sovereignty to presume on such consent.

The invasion of State sovereignty through the corporation tax is actual and real. It is not mere assertion of a conclusion by the pleader that if this defendant corporation discloses to its competitors its private affairs and is liable to a tax of this sort it will have to surrender its charter. No person of the slightest business experience can doubt that the imposition of the tax and the forced publicity of corporate affairs as distinguished from the privacy of the affairs of partnerships and individuals and their exemption from a like tax will drive to the wall this defendant corporation and all similar small corporations which compete with partnerships and individuals. It may not seriously affect the larger and stronger corporations with which the investor is familiar, but it is beyond peradventure that the small corporations which live surrounded by competitors will be extinguished by this devastating law if this Court permits the law to stand. There never has been a better illustration of the truths that the power to tax involves

the power to destroy and that the power to destroy may render useless the power to create. All the reserved power of the States to create these small corporations would be rendered as useless as if it never had existed.

It is no answer to say, as the directors of the defendant corporation have said, that a copartnership may be formed to take over the assets of the Stone Tracy Company. That company, as a corporation, as a body created by the State of Vermont, is threatened with extinction through the enforcement of a Federal statute and it would be absolutely frivolous to suggest as a defense of the statute that the assets of the corporation could be saved from the wreck and turned over to another concern.

In this case, then, the operation of the law would result in confiscation instead of taxation.

"*For taking away our charters*" was one of the grievances of the American colonies against the King of Great Britain. At the time the Declaration (containing these very words) was written the people of Vermont had already rendered conspicuous service in the war for independence. It would be an astonishing result if, years after that independence had been won, it should be found that the government established by the colonies themselves had become an instrument "for taking away our charters".

The decision which we ask this Court to make involves no diminution of the potential resources of the National government. A result of that nature harassed the thoughts of some of the members of this Court when the Income Tax Cases were pending. This is no such case. The taxing power of the Federal government may reach the business of the defendant corporation for two per cent, for ten per cent, for fifty per cent, if necessary, if it will but seek out all who are engaged in the same business and not attempt to tax the corporate franchise. It is that attempt by Congress to tax a franchise created by the State and not the general power to tax that makes this argument.

We summarize our argument in support of the proposition that the general government cannot tax the franchise of a State corporation thus:

FIRST: A State cannot tax an instrumentality of the Federal government (*McCulloch* v. *Maryland*, 4 Wheaton, 316; *Osborn* v. *United States Bank*, 9 Wheaton, 738; *Weston* v. *City Council of Charleston*, 2 Peters, 449; *Dobbins* v. *The Commissioners of Erie County*, 16 Peters, 435; *Bank of Commerce* v. *New York City*, 2 Black, 620).

SECOND: For the same reason, and because a State is as independent a sovereignty within its sphere as the National government, Congress cannot pass any

law taxing an instrumentality of a State (*Collector* v. *Day*, 3 Clifford, 376; s. c. 11 Wallace, 113; *United States* v. *Railroad Company*, 17 Wallace, 322; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429).

THIRD: The Federal Courts have assumed, and the highest State Courts have decided, that a State cannot tax patents granted by the general government (*McCulloch* v. *Maryland*, 4 Wheaton, 316; *Patterson* v. *Kentucky*, 97 U. S., 501; *Webber* v. *Virginia*, 103 U. S., 344; *Allen* v. *Riley*, 203 U. S., 347; *In re Sheffield*, 64 Fed. Rep., 833; *Commonwealth* v. *Westinghouse Co.*, 151 Pa. St., 265; *The People ex rel. Edison Co.* v. *Board of Assessors*, 156 N. Y., 417). A patent is a franchise (*Bloomer* v. *McQuewan*, 14 Howard, 539), that can be granted concurrently by both the State and the United States (*Livingston* v. *Van Ingen*, 9 Johnson, 507; 1 *Robinson on Patents*, Section 45), and is clearly not an instrumentality of either State or Federal government.

FOURTH: This Court has held that a State cannot tax the franchise granted to a Federal corporation, and the decision is placed not upon the ground that the corporation is an instrumentality of the Government, but because the franchise "emanates from, and is a portion of, the power of the Government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the Government, and re-

pugnant to its paramount sovereignty" (*California* v. *Central Pacific Railroad Co.*, 127 U. S., 1, 41).

FIFTH: Inasmuch as the principle of the decision that a State cannot tax a Federal instrumentality was held to apply when the question was reversed and Congress undertook to tax a State instrumentality, it would seem to follow that the reasons and principles for the decision that a State cannot tax a Federal corporate franchise would also apply to an attempt by the general government to tax a corporate franchise granted by a State.

We close this point with quotations from opinions of this Court which fully cover the field of this argument.

> "It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the general government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence, without its consent, or attempt to exonerate them from the performance of any duties, or the payment of any taxes or contributions, to which their position, as creatures of State legislation, renders them liable." (Opinion of the Court by Chief Justice FULLER in *Central Pacific Railroad* v. *California*, 162 U. S., 91, 122, quoting from dis-

senting opinion of Mr. Justice BRADLEY in *Railroad Co.* v. *Peniston*, 18 Wallace, 5, 48).

" Every State has a sphere of action where the authority of the national government may not intrude. Within that domain the State is as if the Union were not. Such are the checks and balances in our complicated but wise system of State and National polity." (Opinion of the Court by Mr. Justice SWAYNE in *Farrington* v. *Tennessee*, 95 U. S., 679, 685.)

" That principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency." (Opinion of the Court by Mr. Justice FIELD, in *Wisconsin Central Railroad* v. *Price County*, 133 U. S., 496, 504.)

" In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one of the chief functions of this Court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other." (Opinion of the Court by Mr. Justice BREWER in *Matter of Heff*, 197 U. S., 488, 505.)

SECOND POINT.

The defendant corporation would be deprived of its property without due process of law.

We have shown that the Corporation Tax Law, if it is found to impose in substance a tax on the franchise of the corporation (whether it take the form of a franchise tax, a license tax, an occupation tax or any other species of tax or excise), must be declared an unconstitutional invasion of the sovereignty of Vermont. While we believe that the Court will find the law to be unconstitutional on that ground, nevertheless if there can be a judicial conception of the Corporation Tax Law which attributes to a cause other than the existence of the franchise and the corporate capacity the liability of the defendant corporation to the burdens of this statute, or if, as we believe, corporate capacity is the cause of liability, we propose showing that the statute, however construed, would deprive the defendant corporation of its property without due process of law.

In taking up this branch of our argument we assert that no justification for this tax is to be derived from any analogy to State corporation taxes. The relation of the States to corporations is different from the relation of the United States to the defendant corporation. A State grants a corporate charter, and it may impose on that charter such conditions to the grant, whether in the form of taxes or otherwise, as it sees fit. The

State, also, has the power of excluding from its borders any foreign corporation, and may impose upon foreign corporations, as a condition to being allowed to do business and exercise their corporate franchises within the State, any tax or other burden. A brief examination of some of the decisions of this Court will disclose full support for what we have stated.

Franchise taxes imposed by States on corporations created by such States have frequently been considered and sustained by this Court.

Society for Savings v. *Coite*, 6 Wallace, 594 (1867).

Provident Institution v. *Massachusetts*, 6 Wallace, 611 (1867).

Hamilton Company v. *Massachusetts*, 6 Wallace, 632 (1867).

Home Insurance Co. v. *New York*, 134 U. S., 594 (1890).

And we understand that the true theory upon which a State may tax a franchise granted by it is that stated by Mr. Justice FIELD in *Home Insurance Co.* v. *New York*, 134 U. S., 594, 600 (1890):

> "The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied by such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or

> month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe."

The States also for years have been requiring the payment of license fees from foreign corporations as a condition of the right to do business or to exercise their corporate franchise within such States. These license fees are not franchise taxes. They are the price which the States, having the right to exclude foreign corporations altogether, may exact for the privilege of entering such States and doing business therein. The theory upon which these license fees are exacted is stated by the same learned Justice.

In *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S., 181 (1888), Mr. Justice FIELD, said at page 186:

> "We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents, and employes; nothing more and nothing less;" * * *

And in the case of *Horn Silver Mining Co.* v. *New York*, 143 U. S., 305 (1892), he said at page 315:

> "Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges."

See also to the same effect:

> *Maine* v. *Grand Trunk Railway Co.*, 142 U. S., 217, 227–8.

Neither the reason of the State franchise taxes nor of the State license taxes on foreign corporations can support the constitutionality of the Federal corporation tax on the defendant corporation; for the defendant corporation was not created by the United States nor has the United States the right to say it shall not do business in Vermont in a corporate capacity.

We understand that the only thing that would prevent the State corporation tax laws from being held to deny to corporations the equal protection of the laws is that the State itself granted the charter and may prescribe the conditions under which it is enjoyed. In

Berea College v. *Kentucky*, 211 U. S., 45, Mr. Justice BREWER said at page 54:

> "In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction it has more or greater powers because the citizen has. 'The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy.' * * * * Such a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the State."

Congress, then, in classifying corporations as the objects of a special corporation tax assumes that apart from the reasons why a State may so classify them, there is some other basis for classification. We submit that there is none and that every feature of business peculiar to corporations is an incident inherent in the franchise granted and exempt from Federal taxation. The defendant corporation in its business of dealing in merchandise pursues the same methods as the firm of Dwight Tuxbury & Sons. It buys for cash or on credit in the same way as the firm.

Precisely as the firm, it endeavors to sell at a profit for cash, or credit, or for commodities. No drummers selling goods in Windsor could perceive any essential difference between the shops of Dwight Tuxbury & Sons and the Stone Tracy Company. No customer in buying goods in Windsor could see any essential difference between the two shops. They are, to all intents and purposes, of the same class. To subject one and not the other to a tax "in respect to the carrying on or doing business" seems the extreme of arbitrariness.

We quote from the opinion of this Court in two cases. In *Kansas Pacific Railroad Co.* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 112 U. S., 414 (1884), Mr. Justice FIELD, speaking for the entire Court, said at page 415:

> "A private corporation is, in fact, but an association of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members without dissolution."

And again, the same learned Justice in *McKinley* v. *Wheeler*, 130 U. S., 630 (1889), speaking for the entire Court, said at page 633:

> "They are little more than aggregations of individuals united for some legitimate business, acting as a single body, with the power of succession in its members without dissolution."

Therefore for Congress to classify corporations as the objects of a special and discriminating tax, whether the burdens are light, oppressive or wholly confiscatory, is utterly arbitrary. We think that our position is well stated by Mr. Justice FIELD's concurring opinion in *San Bernardino County* v. *Southern Pacific Railroad Company*, 118 U. S., 417 (1886), where he was discussing the quite analogous case of a State's denying the equal protection of the laws to a corporation in the method of valuing property for taxation. He said at page 422:

> "I agree to the judgment of the court in this as also in the other tax cases from California. But I regret that it has not been deemed consistent with its duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the Circuit Court, and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. At the present day nearly all great enterprises are conducted by corporations. Hardly an industry can be named that is not in some way promoted by them, and a vast portion of the wealth of the country is in

> their hands. It is, therefore, of the greatest interest to them whether their property is subject to the same rules of assessment and taxation as like property of natural persons, or whether elements which affect the valuation of property are to be omitted from consideration when it is owned by them, and considered when it is owned by natural persons; and thus the valuation of property be made to vary, not according to its condition or use, but according to its ownership. The question is not whether the State may not claim for grants of privileges and franchises a fixed sum per year, or a percentage of earnings of a corporation—that is not controverted—but whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here and continue to come until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions."

We say that classifying corporations by Congress for the imposition of Federal taxes and other special burdens takes their property without due process of law and without just compensation in violation of the Fifth Amendment.

What is "due process of law"? It is process which accords with those "immutable principles of justice which inhere in the very idea of free government" (*Holden* v. *Hardy*, 169 U. S., 366, 389), which proceeds "from laws operating on all alike and not subjecting "the individual to an arbitrary exercise of the powers "of government unrestrained by the established prin- "ciples of private rights and distributive justice" (*Leeper* v. *Texas*, 139 U. S., 462, 468). These principles have been stated time and again in the opinions of this Court from the case of *Bank of Columbia* v. *Okely*, 4 Wheaton, 235, 244, to the case of *Twining* v. *New Jersey*, 211, U. S. 78, 101–2.

Congress must conform to these principles in the passage of every law. As Mr. Justice CURTIS, speaking for the entire Court in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 Howard, 272 (1855), said at page 276:

> "But is it 'due process of law'? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."

The defendant corporation is entitled to the protection of this constitutional safeguard for, as Chief Justice WAITE said in the *Sinking-Fund Cases*, 99 U. S., 700, at page 718, the United States " equally with the States " are prohibited from depriving persons *or corporations* " of property without due process of law."

The limitations on the powers of Congress to levy and collect taxes are not alone in those provisions of the Federal Constitution which relate exclusively to taxation. As Mr. Justice FIELD said in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 599 :

> " There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations * * * of its powers arising out of the essential nature of all free governments ; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations."

We therefore say that the arbitrary action of Congress in placing these unprecedented and oppressive burdens on the defendant corporation and wholly exempting its business competitor from every one of them is not due process of law. We weigh the situation by the opinions of this Court.

In *Ballard* v. *Hunter*, 204 U. S., 241 (1907), Mr.

Justice McKENNA, quoting with approval from Mr. Justice BRADLEY, said, at page 255:

> "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvement, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law.'"

The arbitrary discrimination against the defendant corporation would surely be a denial of the equal protection of the law if the language of the Fourteenth Amendment applied to an act of Congress.

In *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S., 283 (1898), Mr. Justice McKENNA said at page 294:

> "'Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice BRADLEY, in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232, 237.
>
> "And Mr. Justice BREWER, in *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S., 150, 165, after a careful consideration of many cases,

> said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

It seems as if the case at bar furnished the strongest possible instance of where "a tax law directly necessarily and intentionally creates an inequality of burden," to quote the expression used by Mr. Justice BREWER in his dissenting opinion in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., at page 301, and that in his language "it becomes imperative to inquire "whether this inequality thus intentionally created can "find any constitutional justification."

The denial of equal protection of the laws and the taking of property without due process of law are, so far as this case is concerned, the same thing, because the injury complained of lies in the enforcement of a statute which is unequal and arbitrary. As the late Chief Justice FULLER said in speaking for the entire Court in *Duncan* v. *Missouri*, 152 U. S., 377 (1894):

> "Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S., 150 (1897), it appears that a Texas statute provided that if claims on contract or in tort against railroad corporations were not promptly paid, the plaintiffs suing thereon and obtaining judgment for the full amount, might add thereto an attorney's fee of ten dollars. "The single question in this case is the constitu-" tionality of the act allowing attorneys' fees. The con-" tention is that it operates to deprive the railroad com-" panies of property without due process of law, and " denies to them the equal protection of the law" (pp. 152–3). Railroad companies alone were subject to the burdens of the statute.

The Court pointed out that classification of railroads for certain purposes was just; as, for example, for fencing tracks, or for the use of safety-couplers (pp. 158–9), but that every lawful classification "must rest upon " some difference which bears a reasonable and just " relation to the act in respect to which the classification " is proposed, and can never be made arbitrarily and " without any such basis" (p. 155). And Mr. Justice BREWER, in delivering the opinion of the Court, also said, at page 159:

> "The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection

of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained.

" But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice MATTHEWS, speaking for this Court, in *Yick Wo* v. *Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be

made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

* * *

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection" (pp. 165-6).

It was held in the *Ellis Case* that to compel a corporation to pay an attorney's fee to a plaintiff who was successful in a case against it, and not to require an individual defendant to pay an attorney's fee under the same conditions, was as arbitrary, and unfair, and unequal, and unjust as to compel a white defendant to do so and not require a black defendant to do so. In other

words, a corporation was placed precisely on the same basis as an individual.

Now the taxing power of the Federal Government (if this tax is to be deemed an excise or occupation tax, which we deny) is to be exercised on the people doing business in the United States, that is, on the business done in the United States. The business of this country is done by the people either in an individual capacity, or in a partnership capacity, or in a corporate capacity, and the selection for taxation of one class out of all the people doing business in this country is, we submit, class legislation and unequal.

If the Federal Government in laying this tax had imposed it alone on people doing business in this country in an individual capacity, would there be much doubt in anybody's mind but that the selection for taxation of individuals alone would have been arbitrary and unequal and a deprivation of their property without due process of law ?

If the taxing power had selected for taxation from all the people doing business in this country only those doing business in a partnership capacity, would such a discrimination have been deemed a lawful classification, and one which rested " upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed " ?

Now if the selection, for taxation by the general government from all the people doing business in this

country, of only those who do business in an individual capacity, or of only those who do business in a partnership capacity, is arbitrary and unlawful, then it must follow that the selection for taxation of those alone who do their business in a corporate capacity is equally arbitrary and unjust; for under the decision of the *Ellis Case* the corporation and the individual stand on the same ground so far as in this country there rests on Congress and State legislatures the obligation to make equal laws.

It is of no importance that the Fifth Amendment to the Constitution contains no specific clause as to the equal protection of the laws. Congress cannot from such omission claim the right to enact laws which are unjust, unequal, oppressive and arbitrary. No such extraordinary claim has ever been or ever will be made. With the concession that a federal law which deprives a man of his property is arbitrary and unequal, it follows that such law deprives him of his property without due process of law, and is in clear violation of the provisions of the Fifth Amendment to the Constitution.

The Fourteenth Amendment to the Federal Constitution is but declaratory of the law as it had long existed. There was nothing new in it and the provision as to the equal protection of the laws was simply a restatement of an old idea.

As long ago as 1778 Sir William Meredith speaks

of the importance of equal laws in his work entitled —" Historical Remarks on the Taxation of Free States " (published in 1778), as follows at p. 39:

> " If many a page in the history of worldly interest and ambition did not prove the fact, it would be thought incredible that, in a country of liberty, men can be found ready to promote measures that tend to destroy that property in equal laws, which constitutes the best part of a free man's inheritance."

This provision of the Fourteenth Amendment as to equal laws was undoubtedly already covered by the previous clause in the same amendment forbidding a State to deprive any person of his property without due process of law, but was added to the amendment out of abundant caution, just as in the Fifth Amendment we find the clause, " nor shall private property be taken for public use, without just compensation," but do not find such clause in the Fourteenth Amendment.

The argument that, because such clause was omitted from the Fourteenth Amendment, therefore a State could take a man's property for a public use without just compensation has never been sustained by this Court, but it has been held that any State which undertakes to take property for a public use without just compensation deprives a man of his property without due process of law, and is therefore restrained from so doing by the

provision of the Fourteenth Amendment that no State shall deprive any person of property without due process of law. *Chicago, Burlington and Quincy Railroad Co.* v. *Chicago*, 166 U. S., 226, 241.

We simply apply the principle of the decision just cited and insist that the omission from the Fifth Amendment of the provision as to the equal protection of the laws does not give the right to Congress to pass an unequal and oppressive law, as such a law would in effect take property without due process of law and is clearly forbidden by the provision of the Fifth Amendment which says that no person shall be deprived of property without due process of law.

In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79 (1901), this Court unanimously held that a Kansas statute which purported to regulate rates and other matters at stock yards transacting above a certain amount of business, and which statute in reality touched only the defendant, denied to the defendant the equal protection of the laws.

Mr. Justice BREWER said at page 111:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in

> the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540 (1902), this Court held that the Illinois statute prohibiting illegal combinations in business was unconstitutional because it discriminated against certain classes of industry. The character of the statute is well illustrated by the following extract from the opinion of the Court by Mr. Justice HARLAN at page 564:

> "Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against com-

binations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

In the two latter cases the majority of the Court expressly reserved the question whether the unconstitutional features of the statute there under consideration would not also work a taking of property without due process of law.

In these cases the Court mentions a theory that in tax statutes the States are permitted a more unbridled latitude in discriminating or in "classifying" as it is called. This distinction Mr. Justice McKenna in his dissenting opinion in the case last cited (p. 570) seemed

to deny; and the opinion of the Court in *Cox* v. *Texas*, 202 U. S., at pages 450–1, seemed to question its existence; but whether it really exists or whether its existence rests on any permanent and logical foundation, it seems clear that even in tax statutes the Federal Constitution cannot be utterly disregarded. The language in one of these tax cases—*Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232—has already been quoted. That case clearly indicates the law to be that "clear and hostile" discrimination against a class, especially such a discrimination as is "unusual" or "unknown," would render any tax statute unconstitutional, while discrimination which proceeds "within reasonable limits and general usage" would be sustained. While in that case the lawmaking power was the same power as that creating the corporation which was taxed, we ask no greater protection than what this Court thus intimated could be afforded under the Federal Constitution. The "corporation tax" declares a discrimination "clear and hostile" upon companies which owe the general government no allegiance and no debt for their creation. It is a discrimination "unusual" to the extent of being without a precedent in the history of the country and is therefore wholly "unknown." We have shown that it does not proceed within "reasonable limits," for in the reason of things there is no basis for the discrimination; and as for be-

ing within "general usage," the fact that it was hitherto unknown condemns it upon that ground.

So in many of the recent tax cases where the tax was sustained and where the right of the State to classify was admitted, it was clearly intimated that the protection of the Federal Constitution still exists where due process and equal protection of law is denied. For instance, in *American Sugar Refining Company* v. *Louisiana*, 179 U. S., 89, 92, it was said that "arbitrary, oppressive or capricious" discrimination would deny the equal protection of the laws; and in *Billings* v. *Illinois*, 188 U. S., 97, 101, it was said that "classification must be based on some reasonable ground."

We therefore are safe in saying that if statutes respecting taxation are entitled to looser treatment than other statutes in testing their constitutionality, there are still clearly the requirements that such statutes must not discriminate on unreasonable grounds and must not be oppressive or arbitrary. These requirements the Corporation Tax Law completely disregards.

The latest utterance of this Court on the subject is found in *Southern Railway Company* v. *Greene*, 216 U. S., 400, where it was held that a statute of Alabama requiring a foreign corporation, authorized to do business in the State, to pay a special tax denied to such corporation the equal protection of the laws, for the reason

that domestic corporations "owning the same character of property and carrying on the same kind of business" were not required to pay a similar tax. In the course of his opinion Mr. Justice DAY said at pages 417, 418:

> "We, therefore, reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is within the meaning of the Fourteenth Amendment, a person within the jurisdiction of the State of Alabama, and entitled to be protected against any statute of the State which deprives it of the equal protection of the laws.
>
> "It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real

and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150, 155, 165; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 559.

"It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domes-

> tic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

If a law selecting for purposes of taxation foreign corporations out of all the corporations doing business in a State is deemed arbitrary and an unwarranted classification because one corporation is taxed and another "owning the same character of property and carrying on the same kind of business" is not, it is difficult to see why the imposition of a tax upon a corporation and the exemption from taxation of a partnership "owning the same character of property and carrying on the same kind of business" is not equally arbitrary and unequal.

THIRD POINT.

The Corporation Tax Law is unconstitutional because it takes property for public use without just compensation.

We further say that the Corporation Tax Law is unconstitutional because taking private property for public use without just compensation. We do not

refer especially to the one per cent collected on the net income of five thousand dollars or to the incidental extinction of the corporate franchise, but rather to the peculiar requirement of Subdivision 6 of the Corporation Tax Law which says that the returns "*shall constitute public records and be open to inspection as such.*"

Under the provision quoted the Stone Tracy Company's debts, its gross income, its dividends received, its expenses, rentals and franchise payments, its losses, its allowances for depreciation, its interest paid on its indebtedness, its taxes and its net income become publicly known. Thus that property which the defendant corporation has in the privacy of its affairs, in keeping to itself the contents of its books, papers and accounts and its trade secrets, is not only invaded but destroyed. Such property is, we take it, of a kind of which the Federal Constitution was designed to take most jealous care, for the Fourth Amendment provides that the right to such property shall not be violated by unreasonable searches and seizures.

We desire to impress upon the Court that the publicity of the returns under the Corporation Tax Law is not required for the purpose of imposing the tax. After the assessment is made, and the Government has entirely finished with the returns, then they are to become for the first time public records open to inspection. Even if no tax is levied by the Commissioner of Internal Revenue, because there is no income in excess

of five thousand dollars, yet the return is still required to become a public record open to inspection. All tax laws require full returns to be made for the information of the Government to be used in laying the tax, but no law that we know of ever before provided that when the Government had imposed the tax, and finished with the returns, they should then be made public property.

This property is not only taken, but it is taken without just compensation and for no cause which stands in legitimate relation to the power to tax. Manifestly, the exposure to the public of the contents of the defendant corporation's return, after the assessment is made and falls due, can in no way enhance the public revenues. It is an arbitrary and wholly independent action on the part of the government, visitatorial and disciplinary in its nature, and not, in any sense, for revenue purposes.

There is no question that a corporation is protected under the Fifth Amendment against the taking of its property without just compensation.

> *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312 (1893).

And in the case of *Hale* v. *Henkel*, 201 U. S., 43 (1906), Mr. Justice BROWN, in delivering the opinion of the Court, said at page 76:

> " We do not wish to be understood as holding that a corporation is not entitled to immu-

nity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination."

FOURTH POINT.

The corporation tax is a direct tax on the franchise and therefore unconstitutional because not apportioned.

We believe that we have shown beyond doubt that this tax is laid upon the defendant corporation in respect to its franchise to be a corporation and to act in a corporate capacity. We shall now proceed to show that it is also a direct tax.

We do not need to weary the Court with the earlier cases decided by this Court on the question of direct and indirect taxation, but we shall start with the assumption that a tax on personal property may be a di-

rect tax within the decisions in the Income Tax Cases of 1895.

Pollock v. *Farmers' Loan and Trust Co.*, 157 U. S., 429; s. c., 158 U. S., 601.
Nicol v. *Ames*, 173 U. S., 509, 520.

> "The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid."
>
> *California* v. *Central Pacific Railroad*, 127 U. S., 1, 41–42.

A franchise cannot be regarded as an article of consumption like manufactured tobacco. It is not intended for consumption or sale. Therefore a tax on a franchise cannot be imposed on it at a period intermediate the commencement of its manufacture and the final consumption of the article within the rule of *Patton* v. *Brady*, 184 U. S., 608. The tax cannot be avoided by the owners for the time being through a subsequent sale or consumption of the franchise and so become an indirect tax. It remains distinctly of the nature of a capitation or other

direct tax. It is, as stated by Professor Beale in his work on Foreign Corporations, "in the nature of a poll tax."

Beale on Foreign Corporations, Sec. 508, p. 665.

So Judge GARRISON in the case of *The Lumberville Delaware Bridge Co.* v. *State Board of Assessors*, 55 N. J. Law, 529, 537, said in speaking of the New Jersey franchise tax:

> "It is in short a poll tax levied upon domestic corporations for the right to be."

Those taxes which are paid by an individual or a corporation for the right or privilege to do this or that thing or to engage in this or that business are, admittedly, indirect taxes. They do not include, however, a tax on the right to live or the right to be. Such a tax, which is properly called a poll tax, has always been classed as a direct tax and we see no difference in principle between the poll tax on the individual for the right to be and the poll tax on the corporation for the right to be. The right or privilege of existence, whether in the corporation or the man, is not such a right or privilege as may be made subject to an indirect or excise tax. Any tax when placed on the right of the man or the corporation to live is a capitation tax and as direct as any tax can possibly be. The measurement of such a tax by the income from the man's business or the cor-

poration's business cannot alter the true nature of the tax.

We therefore submit that the Corporation Tax imposes a direct tax on the franchise of the defendant corporation.

FIFTH POINT.

The inclusion of joint-stock companies within the terms of the statute does not affect the argument in the previous points.

We have treated the statute in our argument as if it were literally a corporation tax. That the substance and spirit of the law is to impose a corporation tax we think there can be no room for doubt; but included in the phrasing of the statute is also "every * * * joint-stock company or association * * * now or hereafter organized under the laws of the United States or of any State, * * * ."

In this country joint-stock companies are quite unusual. Whether their precise number, all told, is six or sixty is immaterial, but except for two or three of the larger express companies we presume that most American lawyers have no practical acquaintance with joint-stock companies or associations. In some cases these companies or associations are considered as partnerships, in others they are considered as corporations.

But under whatever name they may go we think that if a company consists of a voluntary association, without deriving from public authority any rights which the members could not have exercised in their natural and individual capacity, that company is a partnership, while, on the other hand, if through public authority the association becomes vested with rights, privileges or franchises which the members could not have enjoyed as individuals or as an ordinary partnership, then the company partakes of the nature of a corporation and virtually is such.

It is quite clear, apart from the wording of the Corporation Tax Law, that the framers of the law never intended it to apply to a partnership of any kind, for a few hours before the passage of the Corporation Tax amendment this colloquy occurred in the Senate :

> " Mr. Brandegee : Does the Senator desire to answer my inquiry as to whether the matter of imposing a tax upon partnerships was considered at all by the committee ?
>
> " Mr. Aldrich : I will say that it was considered, and the committee thought it raised a cloud of questions which they did not care to discuss or to dispose of " (44 Cong. Rec., 4028).

But the statute itself disposes of the question by selecting only such joint-stock companies as are

"organized under the laws of the United States or of any State," etc., which therefore means only those that have been legalized—*i. e.*, enfranchised—by public authority.

In *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall., 566 (1870), this Court held that a British insurance company organized under acts of Parliament as a joint-stock company was a corporation and would be held so under the laws of most of the States although in that case the stockholders were individually liable for debts of the company. The Court held that its distinctive and artificial name by which it made its contracts, its power to sue and be sued in the name of one of its members, the power of members to transfer their interests at pleasure, the power of surviving beyond the lives of its members, etc., all having been legalized by acts of Parliament, assimilated the company to a corporation under our laws, and in the concluding paragraph of the opinion Mr. Justice MILLER said at page 576 :

> " We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation * * *."

In the case of *Attorney General* v. *Mercantile Marine Ins. Co.*, 121 Mass., 524 (1877), it was held that under the Massachusetts statutes joint-stock companies were to be regarded as corporations organized under

general laws as distinguished from corporations formed under special charters.

In *People ex rel. Platt* v. *Wemple*, 117 N. Y., 136 (1889), the United States Express Company, one of the very few important joint-stock companies in America, was said to have "the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships" (p. 144). That case is especially interesting from the fact that it involves the interpretation of a tax statute of New York which was evidently taken in part as the form for the Corporation Tax Law of 1909. The New York statute provided that:

> "Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country, and doing business in this State * * * shall be subject to, and pay a tax, as a tax upon its corporate franchise or business." * * * (p. 146).

The United States Express Company maintained that it was a mere partnership and not within the statute, but the Court, pointing out the articles of association and the peculiar rights which it purposed exercising and that statutes of the State of New York provided for just such an organization, concluded that it was not a partnership and was taxable. From the

opinion of the New York Court of Appeals we extract the following at page 146 :

> " In view of the capacities and attributes with which, as we have seen, the United States Express Company is endowed, and in view, also, of the statutes which legalize its assumed capacities and make valid and effective its asserted right of succession, its distinctive name and the alienability of its shares, we find nothing to warrant the contention of the appellant that it is a mere partnership, existing only under its articles of agreement and association. It is true those articles contain no reference to any statute of the State, as one under or by which the company was organized, yet, by the very constitution of the body itself and the privileges and powers which it can only exercise by virtue of those statutes, it must be taken to belong to one of those classes of artificial beings described in the Act of 1880 (*supra*) as ' a corporation, joint-stock company or association.' The several persons composing it are made into a collective body and are given capacity in its name, and not their own, to take, grant, sue and be sued. Thus they are united, or organized, or incorporated. The death of a member causes no interruption, and the power of continued existence of this one body, and its organized or corporate action is derived from no inherent power of one or all of its members, but from the law, which sanctions the union."

And on page 147:

> "In the case before us the agreement, which brought many persons into one artificial body, was so framed as to accomplish that end, and in proposing to conduct its affairs by the power given to it in the mode prescribed by the legislature, they must be deemed, for the purposes of the act in question, to be incorporated, that is, formed or united under the law of the State, whether the artificial body be termed a corporation, a joint-stock company, or association."

We think it therefore perfectly clear that the Corporation Tax Law in including joint-stock companies and associations "organized under the laws of the United States or of any State" meant to include only those companies which by virtue of such laws have powers, privileges or franchises similar to those of corporations. It follows from this that the joint-stock companies stand on the same basis as the corporations as far as the corporation tax is concerned.

We have, perhaps, extended this point more than was necessary because it seems to us that it is really immaterial how the Court views the joint-stock companies within the provisions of the act. If they are partnerships it must be admitted that they are peculiar, limited and few in number. If it be said that Congress has selected that peculiar form of business organization as one of the objects of taxation under the Corporation

Tax Law and if it be said that joint-stock companies have no corporate franchises or other franchises created by sovereignty, such propositions, even if they were sound, would not in the slightest degree sustain Congress in also selecting for taxation corporate capacity and thereby placing a tax on corporate franchises. In other words if Congress could put an excise tax on joint-stock companies because they are partnerships enjoying no franchises from state sovereignty it does not follow that Congress may place a similar tax on corporate franchises enjoyed by corporations.

SIXTH POINT.

The brief of the Government does not meet our case.

A.

With all the ingenuity of the learned late Solicitor-General in dissecting and analyzing the Corporation Tax Law for the sake of determining a proper description of the tax imposed, he did not get away from the ever present fact that the *existence of a corporate franchise is essential to the incidence of the tax*. It may be technically correct to describe the tax as a tax on business, a tax on occupations, an excise, an income tax, or some other variety of

tax or excise. It may be one or more of such impositions, but when all is said the fact still remains that in addition to the tax being one or more of such enumerated taxes it is also levied by reason of the existence or enjoyment of a corporate franchise, and is, therefore, also a franchise tax. The late Solicitor General did not advance his argument beyond this juncture.

A tax may have two characters at the same time. To illustrate: a State may lay an ordinary property tax. Included in property liable to assessment may be property which, while having been imported from abroad, has become intermingled with the general mass of property. That tax is valid. But if that property tax shall be so limited that it touches only the property which has been imported, the tax becomes, in addition to a property tax, an impost which is beyond the power of the State to levy.

Again, a State may tax, with other property, such property as is used in interstate commerce. That tax is valid. But if the State should so limit that tax that it fell only on property used in interstate commerce the tax would be construed as being a tax on interstate commerce in addition to being a property tax and it would be void.

A still further illustration: a State may lay a tax on occupations, including, say, manufacturing. Such a tax is valid. But suppose a State should limit its occupation tax to only those manufacturing concerns

which use things or processes protected by United States letters patent. Such an occupation tax would be also a patent tax and void.

So we say that the United States may tax a business or many businesses done by individuals, partnerships and corporations. Such a business tax is valid. But if the business tax is limited to only such business as is conducted through corporate form, the tax, in addition to being a business tax, becomes also a tax on corporate capacity. We say that such a tax, besides being a business tax, is a franchise tax, and that when the corporate capacity is the creation of a State, the tax includes something that is not a legitimate subject of Federal taxation, and that the tax is unconstitutional upon the authority of *California* v. *Central Pacific Railroad*, 127 U. S., 1. Define and refine the "Corporation Tax" as much as we please, the tax still remains, in its ultimate analysis, a franchise tax, whatever other qualities it may also possess.

B.

To say that this tax cannot be a franchise tax because franchises not used or not productive of income are not taxed is utterly fallacious. It was no answer to the income tax of 1894 to say that it was not a land tax because vast tracts of land yielded no income. The fact that some land yielded no income did not prevent the income tax being a land tax on such land as yielded income.

To say that the inclusion of joint-stock companies deprives the tax of its nature as a franchise tax is also fallacious. The case decided by the Court of Appeals of New York (*People ex rel. Platt* v. *Wemple*, 117 N. Y. 136), cited at length on pages 133 to 135 of this brief, and mentioned on the first oral argument by counsel for the Home Insurance Company, was apparently misunderstood by him. The New York Court of Appeals distinctly pointed out that the New York statute regarding joint-stock companies gave validity and vitality to the structure of the company then before the Court and endowed it with powers which placed it on a level with enfranchised corporations. We feel that counsel who, with others before this Court on the original argument on March 17, 1910, seemed to join forces with the Government in an effort to break down or becloud or slur over the vital point of the case at bar, rested their arguments rather on some of the minor details and on the superficialities of the law and have never gone to the heart of the situation.

We cannot believe that this Court will accept the new and astonishing theory advanced by the late Solicitor-General to the effect that a corporate franchise is not a creation of the State because applications for corporate franchises depend on the volition of individuals. Such a theory is contrary to all authorities in our jurisprudence. As reasonable would it be to say that a Federal patent is not the creation of the

United States because inventive genius and a willingness to apply for the patent must exist before the franchise of the patent is granted to the citizen. That such arguments must be resorted to by the law officers of the United States in order to defend this extraordinary law must certainly arouse suspicion that sounder arguments cannot be found.

C.

There is no authority cited in the brief of the late Solicitor-General which meets any of the points urged in our brief, and we submit that the Court cannot sustain this law upon the authority of any adjudicated case.

This law means nothing short of Federal visitation of State corporations and that means the destruction of State corporations which is the complete equivalent of the power to declare the forfeiture of corporate franchises.

Generally speaking, it is only comparatively small corporations that are chartered by the State of Vermont. From the granting of our charters and from the annual franchise taxes our State derives a considerable portion of its revenue. Our State needs this revenue and needs this source of revenue. We feel that under the enforcement of this Act of Congress our corporations will surrender their charters and that industry in corporate form, with all its advantages to public and private interests within our State, will seriously diminish.

To support this law will involve grave diminution of State sovereignty without actually increasing the tax resources of the General Government because already the defendant corporation and all corporations may be taxed by the United States on business through a general business tax which does not make the existence of a corporate franchise the test of liability. We cannot believe that this Court is willing to sustain this new and wholly unnecessary invasion of State sovereignty which was never understood or agreed to when Vermont was admitted to the Union and which was flatly prohibited by the Tenth Amendment to the Federal Constitution.

SEVENTH POINT.

The judgment of the Court below should be reversed.

MAXWELL EVARTS,
HENRY S. WARDNER,
Of Counsel for Appellant.
JOHN G. SARGENT,
Attorney General of Vermont, representing the State of Vermont, with Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1909.

Office Supreme Court U. S.
FILED
MAR 26 1910
JAMES H. McKENNEY,
Clerk.

No. [redacted]407.

STELLA P. FLINT, as General Guardian of the Property of SAMUEL N. STONE, Junior, a Minor,

Appellant,

vs.

STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY and LEON B. HAYWARD,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

REPLY BRIEF FOR APPELLANT.

MAXWELL EVARTS,
HENRY S. WARDNER,
of Counsel for Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 747.

STELLA P. FLINT, as General Guardian of the Property of Samuel N. Stone, Junior, a Minor,

Appellant,

vs.

STONE TRACY COMPANY, FRANK B. TRACY, IDA S. TRACY and LEON B. HAYWARD,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

REPLY BRIEF OF APPELLANT.

I.

With all the ingenuity of the learned Solicitor-General in dissecting and analyzing the corporation tax law for the sake of determining a proper description of the tax imposed, he did not get away from the ever present fact that the *existence of a corporate franchise is essential to the incidence of the tax.* It may be technically correct to describe the tax as a tax on business, a tax on occupations, an excise, an income tax, or some other variety of

tax or excise. It may be one or more of such impositions, but when all is said the fact still remains that in addition to the tax being one or more of such enumerated taxes it is also levied by reason of the existence or enjoyment of a corporate franchise, and is, therefore, also a franchise tax. The Solicitor-General has not advanced his argument beyond this juncture.

A tax may have two characters at the same time. To illustrate: A State may lay an ordinary property tax. Included in property liable to assessment may be property which, while having been imported from abroad, has become intermingled with the general mass of property. That tax is valid. But if that property tax shall be so limited that it touches only the property which has been imported, the tax becomes, in addition to a property tax, an impost which is beyond the power of the State to levy.

Again, a State may tax, with other property, such property as is used in interstate commerce. That tax is valid. But if the State should so limit that tax that it fell only on property used in interstate commerce the tax would be construed as being a tax on interstate commerce in addition to being a property tax and it would be void.

A still further illustration: a State may lay a tax on occupations, including, say, manufacturing. Such a tax is valid. But suppose a State should limit its occupation tax to only those manufacturing concerns which use things or processes protected by United States letters patent. Such an occupation tax would be also a patent tax and void.

So we say that the United States may tax a business or many businesses done by individuals, partnerships

and corporations. Such a business tax is valid. But if the business tax is limited to only such business as is conducted through corporate form, the tax, in addition to being a business tax, becomes also a tax on corporate capacity. We say that such a tax, besides being a business tax, is a franchise tax, and that when the corporate capacity is the creation of a State, the tax includes something that is not a legitimate subject of Federal taxation, and that the tax is unconstitutional upon the authority of *California* v. *Central Pacific Railroad*, 127 U. S. 1. Define and refine the "Corporation Tax" as much as we please, the tax still remains, in its ultimate analysis, a franchise tax whatever other qualities it may also possess. The foregoing remarks will fully illustrate, we think, the force of the question put by Mr. Justice White to Mr. Johnson.

II.

To say that this tax cannot be a franchise tax because franchises not used or not productive of income are not taxed is utterly fallacious. It was no answer to the income tax of 1894 to say that it was not a land tax because vast tracts of land yielded no income. The fact that some land yielded no income did not prevent the income tax being a land tax on such land as yielded income.

To say that the inclusion of joint-stock companies deprives the tax of its nature as a franchise tax is also fallacious. The case decided by the Court of Appeals of New York (*People ex rel. Platt* v. *Wemple*, 117 N. Y.

136), cited at length on our main brief at page 102, and mentioned on the oral argument by counsel for the appellee in case No. 752, was apparently misunderstood by him. The New York Court of Appeals distinctly pointed out that the New York statute regarding joint-stock companies gave validity and vitality to the structure of the company then before the Court and endowed it with powers which placed it on a level with enfranchised corporations. We feel that counsel who, with others before this Court on March 17, have seemed to join forces with the Government in an effort to break down or becloud or slur over the vital point of the case at bar, have rested their arguments rather on some of the minor details and on the superficialities of the law and have never gone to the heart of the situation.

We cannot believe that this Court will accept the new and astonishing theory advanced by the Solicitor-General to the effect that a corporate franchise is not a creation of the State because applications for corporate franchises depend on the volition of individuals. Such a theory is contrary to all authorities in our jurisprudence. As reasonable would it be to say that a Federal patent is not the creation of the United States because inventive genius and a willingness to apply for the patent must exist before the franchise of the patent is granted to the citizen. That such arguments must be resorted to by the law officers of the United States in order to defend this extraordinary law must certainly arouse suspicion that sounder arguments cannot be found.

III.

This point is not foreclosed by the case of *South Carolina* v. *The United States*, 199 U. S. 437, for that case is readily distinguishable on three separate grounds, stated at length in our main brief at pages 64 to 67, viz.: (1) on the ground that that tax was a general tax on a particular business which had always been taxed by the United States; (2) on the ground that that tax was laid because that particular business, to wit, liquor selling, was being transacted, and not because the State had granted any charter or authority to transact it; (3) on the ground that the dispensaries of South Carolina claimed that they were entitled to total exemption from an occupation tax, while no such claim is made in the case now at bar. In the case at bar the tax has no historic practice to support it. It is imposed, not on account of the nature of the business transacted, but merely because the persons transacting it are incorporated by the State of Vermont.

IV.

There is no authority cited in the brief of the Solicitor-General which meets any of the points urged in our brief, and we submit that the Court cannot sustain this law upon the authority of any adjudicated case.

This law means nothing short of Federal visitation of State corporations and that means the destruction of State corporations which is the complete equivalent of the power to declare the forfeiture of corporate franchises.

Generally speaking, it is only comparatively small corporations that are chartered by the State of Vermont. From the granting of our charters and from the annual franchise taxes our State derives a considerable portion of its revenue. Our State needs this revenue and needs this source of revenue. We feel that under the enforcement of this Act of Congress our corporations will surrender their charters and that industry in corporate form, with all its advantages to public and private interests within our State, will seriously diminish.

To support this law will involve grave diminution of State sovereignty without actually increasing the tax resources of the General Government because already the defendant corporation and all corporations may be taxed by the United States on business through a general business tax which does not make the existence of a corporate franchise the test of liability. We cannot believe that this Court is willing to sustain this new and wholly unnecessary invasion of State sovereignty which was never understood or agreed to when Vermont was admitted to the Union and which was flatly prohibited by the Tenth Amendment to the Federal Constitution.

MAXWELL EVARTS,
HENRY S. WARDNER,
Of Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

STELLA P. FLINT, AS GENERAL GUARDIAN of the property of Samuel N. Stone, jr., a minor, appellant, *v.* STONE TRACY COMPANY ET AL.	No. 747.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

Also fourteen other cases advanced for hearing with the preceding case, viz:

WYCKOFF VAN DERHOEF, APPELLANT, *v.* THE Coney Island and Brooklyn Railroad Company et al.;	No. 751.
FRANCIS L. HINE, APPELLANT, *v.* HOME LIFE INsurance Company et al.;	No. 752.
FRED W. SMITH, APPELLANT, *v.* THE NORTHERN Trust Company, A. C. Bartlett, William A. Fuller, et al.;	No. 753.
WILLIAM H. MINER, APPELLANT, *v.* THE CORN Exchange National Bank of Chicago, Charles H. Wacker, Martin A. Ryerson, et al.;	No. 754.
CEDAR STREET COMPANY, APPELLANT, *v.* PARK Realty Company;	No. 757.
LEWIS W. JARED, APPELLANT, *v.* THE AMERICAN Multigraph Company et al.;	No. 767.
JOSEPH E. GAY, APPELLANT, *v.* THE BALTIC MINing Company et al.;	No. 775.
PERCY H. BRUNDAGE, APPELLANT, *v.* BROADWAY Realty Company et al.;	No. 784.
PAUL LACROIX, APPELLANT, *v.* MOTOR TAXImeter Cab Company et al.;	No. 785.

31497—10——1

ARTHUR LYMAN AND ARTHUR T. LYMAN, as Trustees under the last will and testament of George Baty Blake, deceased, appellants, *v.* Interborough Rapid Transit Company et al.;	No. 796.
GEORGE WENDELL PHILLIPS, APPELLANT, *v.* Fifty Associates et al.;	No. 797.
OSCAR MITCHELL, APPELLANT, *v.* CLARK IRON Company;	No. 800
WILLIAM F. FLUHRER, ALBERT W. DURAND, AND Howard H. Williams, appellants, *v.* New York Life Insurance Company;	No. 816.
KATHERINE CARY COOK, HARRIET HUNTINGTON Cook, and Ellenor Richardson Cook, by Anna H. R. Cook, their guardian and next friend, appellants, *v.* Boston Wharf Company et al.	No. 819.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This brief is filed by leave of court in all the fifteen above-named cases.

The general question presented in all the cases is the constitutionality of section 38 of the act of Congress approved August 5, 1909, known as "The Corporation Tax" enactment. (Statutes of the United States passed at the first session of the Sixty-first Congress, 1909, pp. 11, 112–117.) The section is printed in full as an *Appendix* to this brief.

The cases may be divided into four groups:

(1) Those of miscellaneous companies, which present no exceptional problem under the statute; whereof the Stone Tracy Company (No. 747) is a general merchandizing corporation, The Northern Trust Company (No. 753) is a trust company of Illinois, The Corn Exchange National Bank (No. 754)

is a national bank, The American Multigraph Company (No. 767) is a manufacturing corporation, The Baltic Mining Company (No. 775) is a mining corporation, and the Motor Taximeter Cab Company (No. 785) owns and leases motor vehicles.

(2) Those of insurance companies, viz: The Home Life Insurance Company (No. 752) and the New York Life Insurance Company (No. 816).

(3) Those of so-called public service corporations, viz: The Coney Island and Brooklyn Railroad Company (No. 751) and the Interborough Rapid Transit Company (No. 796).

(4) Those of companies whose transactions relate chiefly, and in some cases solely, to real estate, viz: The Park Realty Company (No. 757), the Broadway Realty Company (No. 784), the Fifty Associates (No. 797), the Clark Iron Company (No. 800), and the Boston Wharf Company (No. 819).

All these companies are corporations "organized for profit;" and all of them, except the New York Life Insurance Company, have "a capital stock represented by shares." The New York Life Insurance Company is "without any capital stock;" but all the assets and income of that company "are acquired, invested, reserved, and held for the sole benefit and protection of the holders of policy and annuity contracts issued by defendant upon the conditions" prescribed in the insurance law of New York, "and such assets and income are paid and distributed to such holders, at the times, in the proportions, and by the methods, in such conditions

of said Insurance Law fixed and determined" (Rec., 1; No. 816). Its holders of policy and annuity contracts are therefore the shareholders of the New York Life Insurance Company. Indeed, the bill against that company expressly alleges that the payment of the tax will "decrease the amounts which the policy-holders are entitled to receive as dividends or in reduction of the premiums upon their policies" (Rec., 5; No. 816).

The operations of the several companies whose dealings relate mainly or solely to real estate vary in character, as do their charter powers; and such statement as is needed concerning the particular nature of the powers and transactions of those several companies will be made in the Third Point of this brief, which considers especially the tax upon those companies.

ARGUMENT.

All the questions involved in the various cases will be discussed under the following general propositions:

First. The tax is not a direct tax upon the property, real or personal, of the corporations, joint stock companies or associations, or insurance companies which are required to pay the tax. On the contrary, the tax is an excise, as the statute expressly declares, upon "the carrying on or doing business" by such companies; and it therefore needs no apportionment among the states according to population under section 2 of Article I or clause 4 of section 9 of Article I of the Constitution of the United States.

Second. The tax is not a direct tax upon shares of the stockholders in the companies to the business of which the tax attaches, or upon the income of such stockholders from their shares.

Third. The tax does not become direct in the special case of a company engaged mainly, or even solely, in the business of handling or dealing in real estate.

Fourth. The tax is not an infraction of the general power of the states to authorize the formation of corporations and joint stock companies.

Fifth. The business of public service companies, such as railroad, street railway, telephone, telegraph, light, water, heat, and power companies is not intrinsically an operation of the state which created the company; and in no case at bar is the state shown, through any peculiar relations established between itself and the public service company, to have made the business of the company its own. Further, the United States may tax even a business conducted for or by a state itself.

Sixth. The tax is not imposed upon state or municipal bonds, or upon the income of such bonds, forming part of the business assets of the company whose business is taxed; and the company's income from such bonds is to be included in the computation of its net income.

Seventh. As an excise, the tax is uniform under clause 1 of section 8 of Article I of the Constitution of the United States, though it is laid upon other

kinds of business than insurance only when the business is conducted by a corporation or joint stock company having shares of stock; and the imposition of the tax upon the business of such corporations and joint stock companies, while the kindred business of individuals and partnerships is not taxed, does not take property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and does not contravene any rule of equal legislation implied from the nature of the National Government.

Eighth. None of the special rules prescribed by the taxing statute concerning exemptions or concerning application or computation of the tax produces any lack of necessary uniformity.

Ninth. The company required to pay the tax is not subjected to any unreasonable search or seizure, or improperly required to incriminate itself, by any of the administrative provisions of the statute.

Tenth. The tax may properly be collected in 1910, though it is measured by the net income of the taxpaying company during the calendar year 1909, of which seven months had already passed when, on August 5, 1909, the taxing statute was enacted.

Eleventh. If in any part or application this taxing statute is unconstitutional, it should be sustained nevertheless in all its other parts and applications.

Concerning these several propositions:

FIRST.

The tax is not a direct tax upon the property, real or personal, of the corporations, joint stock companies or associations, or insurance companies which are required to pay the tax. On the contrary, the tax is an excise, as the statute expressly declares, upon "the carrying on or doing business" by such companies; and it therefore needs no apportionment among the States according to population under section 2 of Article I or clause 4 of section 9 of Article I of the Constitution of the United States.

I.

The negative proposition—that this tax is not direct—is true if the tax be either a duty, an impost, or an excise, within section 8 of Article I of the Constitution; because all those species of tax are, in the constitutional sense, indirect.

It will likewise be immaterial, when we come to the question of uniformity, whether the tax in hand is a duty, an impost, or an excise; because section 8 of Article I of the Constitution requires but one kind of uniformity in all those species of tax, and that is merely geographical uniformity.

Knowlton v. *Moore*, 178 U. S. 41.

However, the affirmative proposition—that this tax is an excise on business—should be treated first because, if the tax can be shown to be an excise, its indirect character is thereby immediately established.

That course will also have the advantage of at once disclosing the exact subject of the tax, viz:

(1) In the case of other than insurance companies, the actual conduct or transaction of business under the special conditions which surround and with the special advantages which attach to such business when done under the exceptional legal rules applying to corporations and joint-stock companies (quasi-corporations).

(2) In the case of insurance companies, the actual conduct or transaction of their business, whether or not done under the exceptional, legal rules applying to corporations or joint stock companies.

II.

The considerations which prove the tax to be an excise on the actual conduct or transaction of business may be presented in four divisions:

1. The explicit declarations of the statute itself, and their controlling force.

2. The numerous decisions of this court reenforcing, instead of contradicting, the explicit declaration of Congress that the tax is an excise.

3. Explanation and distinction of certain decisions of this court which are claimed to prove the tax to be direct, and so not an excise.

4. Answers to special claims that particular features of the statute show the tax to be on property rather than on business.

Of these, successively—

1. The statute imposes the tax in language which leaves no doubt concerning either the subject or the

nature of the tax. It says "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company * * * shall be subject to pay annually *a special excise tax with respect to the carrying on or doing business* by such corporation, joint stock company or association, or insurance company, *equivalent to* one per centum upon the entire net income over and above $5,000 received by it from all sources during such year," etc. The *subject* of the tax is thus expressly declared to be "the carrying on or doing business by" the companies taxed. The property of the company is not the subject of the tax; the franchises of the company are not the subject of the tax. So far as property or franchises are involved at all, it is only their *use in business*, among the necessary instruments of the business, that forms the subject of the tax. The *nature* of the tax is legislatively announced no less clearly than the subject of the tax. The statute says that it imposes "a special excise." While this legislative description of the tax can not prevail against the true character of the tax, as manifested by the subject of the tax, it will be found strictly accordant with the real nature of the tax when the decisions of this court are considered in the next division; and the point now important is that, even if the statutory language defining the subject of the tax could possibly be considered in any way ambiguous, with the result of leaving it uncertain whether property or franchises or the actual transaction of business is the

subject of the tax, still the legislative statement that the tax is intended by its makers to be an excise would suffice to resolve the ambiguity by compelling construction of the statute in a way to make the subject of the tax such as a true excise may be laid upon, viz, in this case the conduct or transaction of business, rather than such as is not the proper subject of an excise. If, then, the statute were less clear and emphatic than it is in showing the subject of the tax to be the actual conduct or transaction of business, the statutory statement that the tax is legislatively intended as an excise would remove any uncertainty.

Further, the statute does not say that the tax is imposed "*upon* the entire net income," though we shall see later that even such language could and should be held to impose an excise upon the business; but the statute again is explicit and careful, saying that the tax "with respect to the carrying on or doing business" shall be "*equivalent to* one per centum upon the entire net income." This language is a specific legislative indication that even the net income of the business is not itself the subject of the tax. It shows, again, that the transaction of business is the subject of the tax, and that the income of the business is used merely as *a means of measuring* the amount of tax, which rests not upon that income but upon the occupation from which it is derived. This court has already had occasion to consider just such a tax as the present, imposed by like language (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397); but it may be said shortly, before coming to a

consideration of the decided cases, that measurement of a tax upon the transaction of business by some particular feature or result of the business not only is proper, but is necessary if the amount of tax on the business is to be determined in any more or less equitable way instead of being imposed arbitrarily. An excise on business of course can be fixed in its amount by the legislature itself, and so can even be made by the legislature the same for different kinds of business or for businesses of the same kind but different size; and unless some rule of measuring the tax by something else than the transaction of business, which is the subject of the tax, is prescribed by the legislature, the amount of tax must be directly and arbitrarily fixed by the legislature. That, however, is obviously unjust, unless the tax is to be of insignificant amount, because it takes no account of differences in volume or profitableness of business, and therefore wholly neglects the serviceableness of the taxed business to its proprietor and the ability of the taxpayer to meet the tax. If a rule of measuring the tax is to be adopted, then, what shall it be? It may be the number of men employed in the business, or the number of transactions had in the business, or the volume of things made or sold in the business, or the gross income of the business, or the net income of the business—any one of these or of a hundred more from which the legislative discretion may choose. The use of one measure is, as much as the use of any other, mere measurement; and the subject of the tax, when clearly indicated to be the conduct or

transaction of the business, is not altered by change of the measure of the tax. If this were otherwise, however, in case of the use of some measures, it would still be true that a tax laid in terms upon the conduct of business is not altered in its nature or subject because it is measured by the net income of the business. Such measure, far from being inappropriate to a business tax, is the most apt and just of all measures for such a tax. Net income from business has the business for its source; measures, not the mere size, but the profitableness of the business; measures therefore the utility to the taxpayer of that on which he is taxed, viz, the business; and accords, more often and more nearly than anything else can, with the ability of the proprietor of the business to pay the tax. Finally, it is worth noting that measurement of a tax on business by its net income, beside being entirely consonant with the subject of the tax, carries no fair or real suggestion of a design to tax property. Net income, and even gross income, from business has no usual relation to the amount of property employed in the business, whether different sorts of business or the same business at different times be considered. In one kind of business, *e. g.*, expressing or plumbing, little property and much labor are employed, and the revenue from the business will therefore be large in comparison with the property engaged in the business. In another kind of business, *e. g.*, buying and selling land or wholesale merchandising, much property and little labor are employed, and revenue will therefore bear a relatively

small relation to the property engaged in the business. In other kinds of business, having an intermediate character, property and labor may be employed in the business in amounts more nearly equal, *e. g.*, in railroading or hotel keeping, and the revenue from the business may be attributed to the use of property and of labor in portions approximating equality. If the same business be considered at different times, the relation of net income to property engaged in the business will vary very largely. In prosperous times, when the amount of business done with a given plant is large, net income from the business will be much higher than in dull times, though the size of the plant with which the business is done remains the same. How, then, can the general use of net income from business as the measure of the amount of tax on business of all different kinds show a legislative purpose to reach property?

The express terms of the Congressional enactment showing (1) that the tax is legislatively intended as an excise, and (2) that the exact subject of the tax is the conduct or transaction of business, and (3) that net income of the business is not the subject of the tax but affords merely a measure of its amount, compel the conclusion that the tax is not direct.

2. Numerous decisions of this court, however, foreclose debate. They may be put for convenience into five groups:

(1) A case identical with the present, holding that a tax declared in the statute to be laid on business in

an amount "equivalent to" a certain percentage of income is an excise on the transaction of the business.

> *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

The tax there involved arose under the statute quoted and construed in the opinion of the court as follows:

> Coming now to the merits of the case, we first notice the contention of the plaintiff that the twenty-seventh section of the act of 1898 imposes a direct tax in violation of the constitutional provision relating to the apportionment of taxes of that kind among the several States.
>
> The above section of the act of 1898 is as follows:
>
> "SEC. 27. That every person, firm, corporation, or company *carrying on or doing the business* of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually *a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts* of such persons, firms, corporations, and companies *in their respective business* in excess of said sum of two hundred and fifty thousand dollars.
>
> "And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation, or company

may be located, or in which such person has his place of business. Such returns shall be verified under oath by the person making the same, or, in case of corporations, by the president or chief officer thereof. Any person or officer failing or refusing to make return as aforesaid, or who shall make a false or fraudulent return, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars for each failure or refusal to make return as aforesaid and for each and every false or fraudulent return."

The contention of the Government is that the tax is not a direct tax, but only an excise imposed by Congress under its power to lay and collect excises which shall be uniform throughout the United States. Art. I, section 8. Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It can not be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts. The tax is defined in the act as "a special excise tax," and, therefore, it must be assumed, for what it is worth, that Congress had no purpose to exceed its powers under the Constitution, but only to exercise the authority granted to it of laying and collecting excises. * * * In view of these and other decided cases, we can not hold that the tax imposed on the plaintiff expressly with reference to its "carrying on or doing the business of * * * refining sugar," and which was to be measured by its gross annual receipts in excess of a named sum, is

> other than is described in the act of Congress, a special excise tax, and not a direct one to be apportioned among the States according to their respective numbers. This conclusion is inevitable from the judgments in prior cases, in which the court has dealt with the distinctions, often very difficult to be expressed in words, between taxes that are direct and those which are to be regarded simply as excises. The grounds upon which those judgments were rested need not be restated or reexamined. It would subserve no useful purpose to do so. It must suffice now to say that they clearly negative the idea that the tax here involved is a direct one, to be apportioned among the States according to numbers (pp. 410, 411, 412, 413).

We have italicized in the quotation of the statute the language showing the identity of that act with the act now under consideration, so far as relates to the subject and nature of the tax and to the measurement of its amount by a percentage of income. This *Spreckels* case really disposes of the present point.

(2) Cases even stronger than the *Spreckels* case, in that they hold that a tax laid in terms on the income of a business—instead of being laid in terms upon the business in an amount equal or equivalent to a percentage of the income—is still an excise upon the business.

> *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433.
> *Railroad Co.* v. *Collector*, 100 U. S. 595.
> *United States* v. *Erie Ry. Co.*, 106 U. S. 327.
> *Springer* v. *United States*, 102 U. S. 586.

In *Pacific Insurance Co.* v. *Soule*, the tax which was held to be an excise on business was imposed by section 105 of the act of Congress approved June 30, 1864, 13 Stat. 276, and by section 120 of that act as amended by the act of July 13, 1866, 14 Stat. 138, upon the "gross receipts of premiums, or assessments for insurance" (sec. 105 of the act of 1864), and "on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy holders, or depositors or parties whatsoever, including nonresidents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds" (14 Stat. 138). This tax therefore was in terms put upon the income of business, whether undistributed or distributed in dividends.

In *Railroad Co.* v. *Collector*, *supra*, and *United States* v. *Erie Railway Co.*, *supra*, the act of Congress imposing the excise (quoted in 100 U. S. 596) laid the tax in terms upon the amounts paid by certain public service companies as interest on their funded debt or as dividends to their stockholders, and also on "all profits of such company carried to the account of any fund or used

for construction." The exact question before the court was whether the tax was laid on the bondholder who received the interest or dividend, or upon the company's earnings; and the latter view was held correct. Interest, dividends, construction expenditures, and money "carried to the account of any fund" were held to comprise the net earnings of the company; and the matter was summed up in these words:

> It results from this course of observation that the tax was not laid on the bondholder who received the interest, but on the earnings of the corporation which paid the interest. (100 U. S. p. 598.)

And, as respects the nature of the tax, the court said:

> The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute (Ib.)

In *Springer* v. *United States, supra,* the tax was laid by section 116 of the act of Congress approved June 30, 1864, 13 Stat. 281, as amended by the act of March 3, 1865, 13 Stat. 479, "upon the annual gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever;" and this tax was held not direct.

In *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429, the court did not overrule the *Springer* case, but explained it as applicable only to income from the business which Springer conducted as an attorney at law, saying of the *Springer* case:

> That was an action of ejectment brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void because the tax was a direct tax, not levied in accordance with the Constitution. Unless the tax were wholly invalid, the defense failed.
>
> The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income, gains, and profits consisted in.
>
> The original record discloses that the income was not derived in any degree from real estate but was in part professional as attorney at law and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.
>
> The opinion thus concludes: "Our conclusions are that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

> While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct (pp. 578–579).

The *Springer* case, therefore, was treated in the *Pollock* case as supporting a tax laid in terms upon the income of business as an excise on that business; though further pertinence on the question of direct taxation was denied to the case.

At least four flat decisions of this court therefore hold a tax put directly upon the income of business to be an excise on the business. These cases, as already said, are even stronger than the *Spreckels* case.

(3) Cases holding various taxes to be excises on business, though they are laid in terms upon property engaged in the business.

> *Provident Institution* v. *Massachusetts*, 6 Wall. 611.
>
> *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632.
>
> *Veazie Bank* v. *Fenno*, 8 Wall. 533.
>
> *United States* v. *Singer*, 15 Wall. 111.
>
> *National Bank* v. *United States*, 101 U. S. 1.

In *Provident Institution* v. *Massachusetts*, *supra*, a tax required of a savings bank "on the amount of its deposits" was held to be an excise on the busi-

ness. In *Hamilton Company* v. *Massachusetts, supra*, the excise was a tax upon "the excess of the market value of all the capital stock of each corporation over the value of its real estate and machinery." Here, in other words, a tax in terms upon all corporate property, except real estate and machinery (doubtless otherwise taxed), was pronounced an excise. In *Veazie Bank* v. *Fenno, supra*, the tax was laid "on the amount of notes of any person, state bank, or state banking association used for circulation and paid out by" a national or state bank; and it was held an excise on the business. In *United States* v. *Singer, supra*, the excise wore the form of a tax in a stated amount upon spirits distilled in the business. In *National Bank* v. *United States, supra*, the excise was like that in *Veazie Bank* v. *Fenno*.

As a result, therefore, of this group of cases, we see that even formal imposition of the tax on property engaged in business does not negative its being an excise on the business.

(4) A case exhibiting an excise on business under a statute which, instead of laying the tax in terms on property engaged in the business, required the tax to be equal to a certain percentage of property so engaged.

Society for Savings v. *Coite*, 6 Wall. 594.

Here the tax was upon savings banks in a "sum equal to three-fourths of one per cent on the total amount of deposits."

(5) Cases which, while not relating to business, classify as excises various taxes imposed by Congress

upon special transactions concerning property or upon the enjoyment or exercise of particular privileges or advantages connected with property.

Here we have first the great group of inheritance tax cases.

> *Scholey* v. *Rew*, 23 Wall. 331.
> *Knowlton* v. *Moore*, 178 U. S. 41.
> *Plummer* v. *Coler*, 178 U. S. 115.
> *Murdock* v. *Ward*, 178 U. S. 139.
> *United States* v. *Perkins*, 163 U. S. 625.
> *Snyder* v. *Bettman*, 190 U. S. 249.

Of these cases, the first four decide the immediate point that an inheritance tax is not direct upon the inherited property, but is rather a tax upon the transmission and receipt of the property. In *Knowlton* v. *Moore* it was said:

> The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for

if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. * * * The question which was thus reserved in *Scholey* v. *Rew*, and which was presented for decision in the Pollock case, was decided in the latter case, the court holding that taxes on the income of real and personal property were the legal equivalent of a direct levy on the property from which the income was derived, and therefore required apportionment. But there was no intimation in the Pollock case that inheritance taxes—which had been held in *Scholey* v. *Rew* not to be direct, which had from all time been considered as being *imposed not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property* occasioned by death, and which had from the foundation of the Government been treated as a duty or excise—were direct taxes within the meaning of the Constitution. Undoubtedly, in the course of the opinion in the Pollock case, it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because *imposed upon property solely by reason of its*

> *ownership*, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy (pp. 78, 81).

In *Scholey* v. *Rew*, too, the inheritance was real property.

If a tax upon the exercise of the right to receive property, personal or real, by inheritance is not a direct tax on the property, though (as was true of all the Federal inheritance tax laws) the inheritance tax is measured by the value of the inherited property, it must be equally true that a tax upon the exercise of the right to use property in one or another kind of business—especially under the peculiar conditions and advantages of corporate business—is not a direct tax.

In *United States* v. *Perkins* and *Snyder* v. *Bettman*, *supra*, the immediate point of decision was that an inheritance tax imposed by a state on succession to a legacy by the United States, or an inheritance tax imposed by the United States on succession by a municipality of a state to a legacy, is not a tax upon the legacy itself. The distinction is again enforced between taxation upon the receipt of property and taxation upon the property itself. Such distinction is certainly no more plain or real than that between taxation of a business in which property is used and taxation of the property itself.

Another kind of excise is found in taxation of sales of corporate shares.

Thomas v. *United States*, 192 U. S. 363.
Hatch v. *Reardon*, 204 U. S. 152.

In sustaining such an excise, this court said:

> The sale of stocks is a particular *business transaction* in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation. (192 U. S. p. 371.)

That is, such a tax falls within the indirect class.

Taxation upon the transaction of selling property is therefore different from taxation upon the property itself, at least when the sale is in a special manner and under the special legal rules pertaining to corporations. Even in its more limited interpretation, as applying only to a sale of corporate property under special rules, *Thomas* v. *United States* would be sufficient to show at any rate that the use of property in corporate business, under the special rules of law pertaining to such business, is a different subject of tax from property itself. Such limited interpretation of the doctrine, however, can not be accepted, in view of the stamp taxes put by Congress upon deeds and leases of real estate, and upon other forms of conveyance of both personal and real

property, at many different times and to a wide extent. Such stamp taxes are obviously imposed upon the transaction of conveyance of property, and they have never been considered direct taxes upon the conveyed property, requiring apportionment under the Constitution.

Finally, we have *Nicol* v. *Ames*, 173 U. S. 509.

This case sustained as an excise the tax put by Congress in 1898 upon sales of merchandise "at any exchange or board of trade, or other similar place," the tax being measured by the value of the article sold. The tax was held to be laid upon the enjoyment or utilization in the sale of the peculiar advantages afforded at an established place of general exchange. So, in the present case a tax upon business transacted by corporations may be said to be a tax upon the enjoyment or utilization in the business of the peculiar advantages accorded by the law to corporate business.

As a result of the varied and cumulative cases in the foregoing five groups, it is difficult to understand how the indirect character of the tax under consideration can be seriously questioned. No question could be more satisfactorily answered by existing authority.

3. Certain cases, however, are urged as undoing the long line of decisions showing excises, to which reference has just been made. It would be profitless to take up each case for which some such effect is claimed. Enough will be done if a word is given to the Income Tax Cases themselves, because of their

dealing immediately with the question of direct taxation, and to a very few leading cases (not dealing with the question of direct or indirect taxation) which are distinguishable for reasons frequently applicable to appellants' citations.

(1) As to the Income Tax Cases—

Pollock v. *Farmers' Loan & Trust Company*, 157 U. S. 429; S. C. 158 U. S. 601.

These cases were carefully separated by the court from those of business excises. Mr. Chief Justice Fuller said, in the opinion after reargument:

> We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such. (158 U. S. 635.)

Again, in treating the separableness of the unconstitutional from the constitutional parts of the Income Tax Act of 1894, the Chief Justice said:

> We do not mean to say that an act laying by apportionment a direct tax on all real estate or personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations (p. 637).

These statements were made with unmistakable reference to the provisions contained in section 27 of the act of 1894 concerning income "from any profession, trade, employment, or vocation carried on

in the United States or elsewhere," and to those provisions contained in section 32 of the act concerning taxation of "the net profits or income above the actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships." These provisions are quoted on pages 435–438 in 157 U. S.

It appears, therefore, that the court in the *Pollock* case expressly differentiated a general income tax from a tax on business income. *A fortiori*, an ordinary, general income tax is different from a tax on the transaction of business, which is merely measured by business income.

Turning to the exact holding of the *Pollock* case, we shall find the distinction to have been that a tax on income is a direct tax on the property, personal or real, which supplies the income, if the income proceeds from the mere ordinary or purely proprietary enjoyment of the property. The distinction does not reach to the case of taxation of income gained through the use of property, in conjunction with labor and usually also with other property, in business of one

or another kind. The quotation already made from *Knowlton* v. *Moore*, 178 U. S. 81, interprets the *Pollock* case—undoubtedly with the concurrence of the entire court—as referring to a tax "*imposed upon property solely by reason of its ownership.*" That must mean a tax upon property by reason of its mere existence or ordinary enjoyment, though the property is not put to some special use. A tax upon business is not a tax imposed upon property "solely by reason of its ownership;" for, if the property is not put into business use, no tax falls upon it or its income.

The distinction was put in still another way by the Chief Justice in the quotation above made from *Thomas* v. *United States*, 192 U. S. 371. He said:

> The stamp duty is contingent on the happening of the event of sale, and *the element of absolute and unavoidable demand is lacking.*

That element must be present before there is direct taxation of property. No tax is direct unless it falls upon property or its income independently of the property's employment in a particular way.

Finally, in the *Spreckels* case, 192 U. S. 397, this court without dissent declared the irrelevancy of the *Income Tax Cases* to a statute putting a tax upon business, in these words:

> It is said that if regard be had to the decision in the *Income Tax Cases*, a different conclusion from that just stated must be reached. *On the contrary, the precise question here was not intended to be decided in those cases.* For, in

> the opinion on the rehearing of the *Income Tax Cases* the Chief Justice said: "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges or employments, in view of the instances in which taxation on business, privileges or employments has assumed the guise of an excise tax and been sustained as such" (p. 413).

(2) As to certain typical citations made by appellants in support of their contention that the tax is direct on property—

It is said that a state tax upon the occupation of an importer is a tax on the import (*Brown* v. *Maryland*, 12 Wheat. 419); that a state tax upon income from an official position is a tax upon the office (*Dobbins* v. *Erie County Commissioners*, 16 Pet. 435); that a state tax upon a bill of lading for exported gold is a tax on the export (*Almy* v. *California*, 24 How. 169); and that a state tax on an auctioneer's sales of imported goods in the original packages is a tax upon the imports (*Cook* v. *Pennsylvania*, 97 U. S. 566). These cases, however, are entirely irrelevant to the question whether a Federal tax on the conduct of business is a *direct* tax on property used in the business. They are distinguishable in two ways:

(*a*) The taxes in the cited cases were all state taxes, and a state can not lay a tax upon an import or upon an office of the United States or upon an

export, *either directly or indirectly*. The taxes involved in the cited cases were, therefore, invalid, whether direct or indirect.

(*b*) Even if a state tax upon the occupation of an importer or upon an auctioneer's sale of imported goods in original packages were not considered a tax upon the import itself, and if a tax upon a bill of lading for transportation of property were not considered a tax upon the transportation itself, and if a tax upon official income were not considered a tax upon the office itself, still all the above state taxes would be invalid because they inevitably and materially hampered and interfered with importation and interstate or export transportation and the governmental operations of the United States; and a State can not interfere at all, *by tax or otherwise*, with free importation, free interstate commerce, free exportation, or free performance of the governmental work of the United States. This results from express clauses of the Federal Constitution and from the supremacy of the United States Government in its own field. We shall see, when treating points Fourth and Fifth in this brief, that the converse proposition—that the United States can not at all hamper or interfere with anything upon which the states have the reserved power to act, such as domestic commerce—is not true. The difference results from the fact that each power granted to the United States by the Constitution is superior to, and may override, many powers of a state. The Federal power is

supreme, and the state power is subordinate when the two meet.

Questions that look alike are often altogether different and must have different answers, because they arise under different provisions of the Constitution. This court has so said in the following language from *Hatch* v. *Reardon*, 204 U. S. 152:

> It is urged further that a tax on sales is really a tax on property, and that therefore the act, as applied to the shares of a foreign corporation owned by nonresidents, is a taking of property without due process of law, (*Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S., 194.) This argument presses the expressions in *Brown* v. *Maryland* (12 Wheat., 419, 444); *Fairbanks* v. *United States* (181 U. S., 283), and intervening cases, to new applications, and farther than they properly can be made to go. Whether we are to distinguish or to identify taxes on sales and taxes on goods depends on the scope of the constitutional provision concerned. Compare *Foppiano* v. *Speed* (199 U. S., 501, 520). A tax on foreign bills of lading may be held equivalent to a tax on exports as against Article I, section 9; a license tax on importers of foreign goods may be held an unauthorized interference with commerce; and yet it would be consistent to sustain a tax on sales within the State as against the Fourteenth Amendment so far as that alone is concerned (pp. 158, 159).

(3) As to *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217—

Nothing in that case is pertinent to the present case. Its decision was merely that "a tax upon railroad corporations * * * equal to one per cent of their gross receipts," (p. 224) from whatever source, is a tax on interstate commerce. Such decision did not depend at all upon the question whether the tax was on the business of the company in an amount equal to one per cent of its receipts or was directly upon the receipts. In either case the tax was on interstate commerce. Nor did it make any difference whether the interstate commerce was taxed directly or indirectly; for a state can not tax that commerce in any way.

4. The claim is made by appellants that the conduct or transaction of business can not be deemed the subject of the tax, unless in the case of insurance companies, because the same kind of business is not taxed when individuals or partnerships conduct it. This is asserted to show that the tax is on what corporations possess and individuals or partnerships in the same business do not possess, viz, franchises. The answers are obvious:

(*a*) Business done by a corporation or joint stock company, under the exceptional and advantageous rules of law applicable to them, is not the same, in either a legal or a practical view, with kindred business done by individuals or partnerships. The two *businesses* are importantly different; and *the impor-*

tance of the difference proceeds, not from the presence or absence of franchises, but from the wide and important diversity of legal rules affecting the two kinds of business.

(*b*) Even if possession or lack of franchises were the only difference between the business of a corporation and the business of an individual or partnership, it would not follow that the franchises are the subject of the tax. They might, and doubtless would be, on that supposition, the *reason* why the legislature puts a tax upon the business in which franchises are used and does not put it upon the business in which they are not used; but that which induces taxation need not be the thing taxed. The universal taxation of land is doubtless induced by the fact that it is immovable and visible, and so can not escape taxation; but the land, and not certain special qualities of it, is the subject of the tax.

(*c*) Further, it is not true that the diversity of general legal rules applying to corporate and unincorporated business and the possession or absence of franchises are the only differences between corporate and unincorporated business. On the contrary, *another difference* (*and, in reference to franchises, the practical and real difference*) *is in the exercise or use* of the franchises *in the corporate business,* whereas they are not used in the unincorporated business. Even if this tax were regarded merely as a tax upon the exercise or use of franchises, instead of being a tax on the entire conduct or transaction of business under many special conditions, it would be altogether different from a

direct tax on the franchises themselves. A tax upon the use of franchises in business is no more a direct tax upon the franchises than a tax upon the use of property in business is a direct tax upon the property so used. The numerous and decisive authorities already given settle that proposition, and particularly here.

Veazie Bank v. *Fenno*, 8 Wall. 533, 547.

(*d*) Still further, do all the varieties of joint stock company possess franchises? Their business is done under conditions and with incidents not attaching to any similar business done by individuals and partnerships; but many joint stock companies have no true franchises. A law, therefore, which taxes a business when done by a joint stock company of any kind, as well as when done by a corporation, can not be said to make franchises the subject of the tax, though the joint stock company has none.

(*e*) The tax is indisputably laid on the business of insurance companies, whether or not they are corporations or joint stock companies, and therefore whether or not they have any franchise or anything like a franchise. It is not reasonable to suppose that, when in the case of an insurance company its business is the subject of the tax, anything else than the conduct or transaction of business is the subject of the tax in the case of a corporation or joint stock company. Consider, for example, whether the tax is laid upon the franchises or the business of an insurance company which is a corporation. Is it possible to say that the franchises are the subject of the tax, though

in the case of an unincorporated insurance company its conduct or transaction of business is the subject of the tax?

(*f*) Finally and conclusively, *franchises can not be the specific subject of the tax. No tax is imposed in any way or on anything unless business is actually done.* The statute lays the tax in terms "with respect to the carrying on or doing business," whether by a corporation or joint stock company or insurance partnership. If no business is actually done, there is therefore no tax, notwithstanding the fact that the corporate franchises all the while exist and may have very large value. If franchises were the subject of the tax, they would of course fall under the tax independently of the actual transaction of any business in the exercise of the franchises and independently of there being any income from business. This ought to set the matter at rest.

Nor could it be admitted by any means that, if franchises were the subject of the tax, there would necessarily result a direct tax on franchises as property. On the contrary, even then the tax would have to be considered an excise on the franchises viewed and treated by the law as special privileges. Several things show this:

(*a*) In 1 Cooley on Taxation (3d ed.) the possibility of and the distinction between taxes on franchises as privileges and taxes on franchises as property are well set forth. Judge Cooley said:

> An *excise* tax on the franchise of a corporation is sometimes imposed. Where a tax is plainly imposed on the corporate privilege, it must be sustained, even though in effect it duplicates the burden on the corporate body. But such taxes are often measured by a standard which suggests the question whether in fact they are not taxes on property, in which case they might not perhaps be admissible. A case in illustration is that of a percentage on the capital stock paid in; which in Massachusetts has been held to be not a property tax, but a tax on the franchise. (*Portland Bank* v. *Apthorp*, 12 Mass., 252.) *Such a tax may obviously be either the one thing or the other*, and the phraseology of the statute under which it is laid may determine which it is in the particular case (pp. 676, 677).

The reverse possibility of a tax on franchises as property is stated by Judge Cooley thus:

> In some States all taxation as far as possible is brought to an *ad valorem* standard. Franchises are property, and in such States may be taxed by a valuation, being estimated for the purpose either separately or as a part of the aggregate corporate property (p. 686).

The Massachusetts cases thoroughly show that a tax on franchises may be an excise instead of a property tax. Indeed, various forms of tax in Massachusetts have been upheld as excises on corporate franchises, though under the constitution of that state they would not have been valid as taxes upon the

franchises treated as property. Besides *Portland Bank* v. *Apthorp*, 12 Mass. 252, we cite the following:

Connecticut Mutual Life Insurance Co. v. *Commonwealth*, 133 Mass. 161, 162, 163.

Commonwealth v. *Hamilton Manufacturing Co.*, 12 Allen, 298, 300–306.

Commonwealth v. *People's Savings Bank*, 5 Allen, 428.

The taxes on franchises were held to be excises in these cases, though in *Commonwealth* v. *Hamilton Manufacturing Company* the amount of the tax depended upon the excess value of the corporate shares above the value of the company's real estate and machinery, and though in *Commonwealth* v. *People's Savings Bank* the amount of the tax depended on the amount of deposits in the bank.

Like taxes have been recognized in many instances by this court as privilege taxes:

Society for Savings v. *Coite*, 6 Wall. 594.

Provident Institution v. *Massachusetts*, 6 Wall. 611.

Hamilton Co. v. *Massachusetts*, 6 Wall. 632.

Maine v. *Grand Trunk Railway Co.*, 142 U. S. 217.

Home Insurance Co. v. *New York*, 134 U. S. 594.

Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 313.

(*b*) Which, then, is the tax under discussion—even if for the sake of argument it be admitted to rest directly on the franchises—a privilege tax or a property tax? At least three things show it to be a privilege tax and

not a property tax. In the *first* place, the tax is not exacted at all, in any way or on anything, unless the franchises are actually used in the transaction of business and a business income above $5,000 results from such use. The franchises themselves, however, exist, though they are not used, and their value may be, and often is, great before use or in an interval of disuse. If the franchises were taxed as property, they would be taxed without reference to actual use; because they exist as property without reference to actual use. In the *second* place, the tax is not made to depend upon the value of the franchises, either alone or in connection with ordinary property. If it were, assessment of such value would be necessary and would be provided in the statute. It can not be said that the income which measures this tax measures likewise the value of the franchises, for that income does not proceed from the franchises alone, or even partly from the franchises, except as they are used. The income which measures this tax is that which results from "carrying on or doing business;" and that income results from the intermixed and cooperative employment of skill, labor, ordinary personal and real property of unnumbered kinds, and franchises (if the business is done by a corporation). Franchises alone can not be regarded as the source of the income any more than skill and labor alone or other kinds of property alone can be so regarded. Therefore, the point returns that this tax is not measured by the value of corporate franchises any more than it is measured by the value of any property

whatsoever. It is measured by income resulting from the transaction of business, and it is impossible to say that the tax is put upon franchises as property. In the *third* place, there is certainly room to treat this tax—if, for the sake of argument, it be conceded to rest upon corporate franchises—as a privilege rather than a property tax. Opportunity to so consider it is of itself enough to sustain the tax, for any ambiguity must be resolved in favor of the statute's constitutionality.

It is also claimed by appellants that this tax is not imposed on business, but on property directly, because it is measured by a company's net income "received by it from all sources" during the year This proposition likewise has several answers:

(*a*) Obviously, the words "all sources" in the act mean, so far as they relate to property rather than activities of the business, such property as is engaged in or connected with the business. In other words, they relate only to what may be described generally as "business assets." Such is the natural and perhaps unavoidable result of the statement of the statute that the tax is laid "with respect to the carrying on or doing business" by the corporation, joint stock company, or insurance company. It would be unnatural, even though permissible, to measure a tax "with respect to the carrying on or doing business" by consideration of income from other than business assets, even in case of a business done by an individual or a partnership; and a corporation or joint stock company, as will soon be

argued, has no property which is not legally and practically an asset of the business. Beyond this, if the constitutionality of the statute be dependent in any way upon exclusion of income from other than business assets in the computation of the net income which measures the tax on business, that necessity is in itself a sufficient and controlling reason for interpreting the language of the statute, viz, these words "all sources," in a way that will make the statute constitutional rather than unconstitutional. No citation of authorities is necessary on that point. Such authorities abound and are but particular illustrations of the unquestioned maxim—*Benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.*

(*b*) All the property of a corporation is both *legally and practically* devoted to and used in the corporate business. This is true whether such property constitutes part of the regular capital of the corporation or is surplus derived from profitable operations of the corporation. As to capital: This consists of property contributed expressly for the purposes of the business or restoring the original contribution if for a time it has been diminished. The business adventurers deliberately embark such property in the enterprise. It constitutes a special fund, which can not be diverted from the business without proper consent of the proprietors. Even creditors also have distinct and important rights against its diversion to purposes foreign to the business. It is sometimes called by law "a trust fund;" and, whether that description be in all

respects accurate or not, a real analogy exists in the rules of law concerning corporate capital and trusts generally. Such rules, indeed, are the necessary converse of the immunity of corporate stockholders from personal liability for the business debts. *Practically also* capital is used in the business, even if not all of it is directly active at a given time. The more capital a company has the greater is the public confidence in it; with the results that it can borrow money at a lower rate of interest, it can obtain lower prices on its materials because of its greater credit or because of the more reliable permanence of its patronage of those who sell to it, and it will even do more business in selling its own service or product because of the greater general confidence in its reliability and stability. As to surplus: This, like regular capital, is devoted by the business adventurers to the uses of the business no less because the adventurers might take it out of the business if they saw fit. It can not be diverted from the business any more than capital without the proper consent of the proprietors. Practically, of course, surplus operates to the advantage of the business as much as an equal amount of capital and procures for the business an enlargement of transactions and a greater economy of operations in the same way as capital. Additionally, surplus has the business as its source and can go out of the business in no way but to meet business obligations or in distribution of business profits.

Indeed, as to both capital and surplus, a corporation (formed, for profit, and therefore for the conduct

of a business described in its charter) *has no right to hold any property except for the purposes of the business*, and therefore as business assets. It can not legally be a mere proprietor of property unconnected with the business. An attempt by the corporation to hold extrinsic property would be an abuse of its charter, and expose it to forfeiture of that charter. No corporation can claim that it holds property in any other way than as business assets when it has no right so to hold property. It is legally estopped from questioning the business character of its assets.

(*c*) What has been said concerning the capital and surplus of a corporation will apply likewise to the capital and surplus of a joint stock company having shares. All the property of that company is represented by the shares, and the shareholders devote it to the purposes of the business. There is both a legal and a practical tie between the company's property and its enterprise. What property the shareholders have individually is not represented by the shares, and so is out of the business. Their property represented by the shares is in the business. The line of demarcation between the property in the business and the individual property of the several persons concerned in the business is the same as in the case of a corporation. And practically, of course, the property belonging to the joint stock company brings to the business the same opportunity of enlarged transactions and increased profit as the

same property would bring to the same business conducted by a corporation.

And an excise on business may be measured even by the *capacity* of the business plant, though its actual operations are less than its capacity. (*United States* v. *Singer*, 15 Wall. 111, 120, 121.)

(*d*) There is nothing to the contrary of all this in the *Spreckels* case, 192 U. S. 397. It was there held that the statute imposing an excise upon all persons and companies "carrying on or doing *the business of refining* petroleum *or refining* sugar" in an amount "equivalent to" a percentage "of all receipts of such persons, firms, and corporations and companies *in their respective business*" (p. 410) referred only to "receipts in the business of refining sugar, not receipts from independent sources" (p. 417). The court went on:

> But, clearly, neither interest paid to the plaintiff on its deposits in bank nor dividends received by it from investments in the stocks of other companies were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business; and whether they would be divided among stockholders or *be used in the further prosecution of the business* was for the plaintiff to determine. They could have been used for purposes wholly *distinct from the business of refining sugar*. We are of opinion that the

> receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business *of refining sugar*, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with *that* business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. *In the absence of any showing to the contrary*, it must be assumed that the declaration or the receipt of dividends on such stocks was wholly apart from the particular business in which the holder of the stock was engaged (p. 417).

It was, perhaps, to meet just this ruling that the Corporation Tax enactment requires income from "all sources" to be computed; meaning thereby the income from all assets of the business as a general whole. As a matter of construction, the statute now under consideration cannot be given the restricted meaning put upon the statute in the *Spreckels* case, unless indeed the constitutionality of the new statute so demands. The statute involved in the *Spreckels* case defined the particular business, or division of the company's general business, on which the tax was to be computed. It specified "refining sugar." Here the statute does not define the business, or limit the computation of the amount of tax by income from any single part of the company's entire business; and, on the contrary, it explicitly requires all income that can be considered business income of any kind

to be taken into the computation. Nor does the *Spreckels* case hold inclusion of all the corporate income to be unconstitutional. That case merely interpreted the statute in a particular, restricted way, without even suggesting that such interpretation was required by any constitutional reason. Nothing whatever was said, or involved, concerning the constitutionality of such a statute as now is before the court. The constitutional right of the legislature to measure a tax upon the business of a corporation or joint stock company by a percentage of the income of that corporation or joint stock company from all its assets follows from the necessary character of all the corporate or joint stock company's property as business assets; which has already been shown.

Some appellants assert that the tax is shown to be on income or property rather than on the actual transaction of business because the statute allows dividends received by the taxed company on stocks owned by it in other companies, which are themselves subject to the tax, to be excluded from the computation of net income. This claim, however, can have no weight. Congress was evidently influenced to the exclusion of such dividends by an equitable purpose of not requiring the tax to be increased in amount because of income which had already been affected and reduced by the tax. Such equitable rule has equal propriety whether the tax is on business or on property; and is equally consistent with either view. A similar contention was

made in *Commonwealth* v. *Hamilton Manufacturing Company*, 12 Allen, 298, as a support for the general claim that the tax was on property, but that contention was rejected in these words:

> It was suggested that the deduction of the value of the real estate and machinery from the aggregate market value of the stock allowed by the statute was an indication that the tax was in fact a tax on property and not an excise on the franchise. But we do not think that much weight can be given to this consideration. The reason for the deduction is obvious. The real estate and machinery of corporations, under the general tax act, are subject to local taxation in the towns where they are situated. Inasmuch as all taxes on corporate property operate to take away a portion of that which would otherwise belong to shareholders, it would tend to inequality and to double taxation, if, in assessing the excise on the franchise, no deduction were made for what was taxed in a different manner elsewhere. It was this consideration, doubtless, which led to the allowance of the deduction, as a similar one was permitted in St. 1862, c. 224, imposing the amount of tax on savings banks. (See *Commonwealth* v. *People's Five Cents Savings Bank, ubi supra.*) But we do not see that this provision has any bearing on the nature of the tax imposed by the statute in question (pp. 305, 306).

III.

The established rule that the states may tax property used in interstate commerce, though they may not tax the business of interstate commerce or income from that business, shows that a tax upon the business is different from a tax upon the property employed in that business, and so is not direct.

The difference of rule is settled. Neither interstate business nor the income from interstate business may be taxed by a state.

> *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania* 122 U. S. 326.
>
> *Galveston, Harrisburg, etc., Ry. Co.* v. *Texas* 210 U. S. 217.

On the other hand, the property used in interstate business may be taxed by a state.

> *Pullman Palace Car Co.* v. *Pennsylvania* 141 U. S. 18.
>
> *Adams Express Co.* v. *Ohio State Auditor* 166 U. S. 185.
>
> *Fargo* v. *Hart* 193 U. S. 490.

It follows inevitably that a tax on property, without reference to its use, is legally different from a tax on business, though it includes the use of property in that business. The proposition that a tax on property is not the same as a tax on the business in which that property is used is in fact the mere converse of the proposition that a tax on business is not a tax on the property used in that business.

SECOND.

The tax is not a direct tax upon shares of the stockholders in the companies to the business of which the tax attaches, or upon the income of such stockholders from their shares.

Three lines of reasoning lead to this result:

I.

The outcome of the First Point, that this tax is not direct on property, but is an excise on the conduct or transaction of business, really includes our Second Point. If the tax is not direct on the property of the corporation or joint stock company itself, *a fortiori* it is not direct on the rights of the several shareholders to receive proportionate parts of that property in the event of a distribution; and, if the tax is an excise on the business of the corporation or joint stock company, *a fortiori* it is no more than an excise on the individual stockholder's participation in the business.

If this tax could be deemed to fall on the property or income of the shareholders, it would still be only a tax on the use of that property in, or income of that property from, "business"—not on the mere ordinary proprietary enjoyment of the shareholders' property.

II.

But in truth a tax on the business of the company is not, in legal view, a tax on the shares of the company's stock or on the income from those shares at all.

Logan County v. *United States*, 169 U. S. 255, is here conclusive.

Logan County held stock in a railroad company. The United States had collected an excise tax on the railroad company's "profits carried to the account of any fund or used for construction." A stock dividend was thereafter made by the railroad company. Logan County claimed that its portion of this stock dividend was less because the surplus funds of the railroad company had been reduced by the Federal tax upon it; that the tax on the railroad company's business was therefore really a tax on Logan County's dividend; that the property and revenues of a municipal corporation are not taxable by the United States (*United States* v. *Railroad Co.*, 17 Wall. 322); and that, as a final result, Logan County was entitled to recover from the United States the amount by which its stock dividend had been reduced in consequence of the tax, in an action which Congress had expressly allowed to be brought against the United States as a test of the matter. It was held that the tax, being imposed upon the business of the railroad company, was not a tax upon Logan County's share of the railroad company's surplus funds or upon Logan County's stock dividend based on those funds. The court said:

> Of course, the payment of the tax diminished the profits of the company by just that amount. But, at the time when it was paid, the full amount thereof was due the Government from the company itself, and not one penny could

> properly have been deducted from the amount of the tax by reason of the fact that a municipal corporation owned a certain amount of the stock of the company. All taxes which were levied on the property of the company were payable in their full amount by the company, and not a dollar could be legally deducted from such tax on account of the character of any owners of its stock. Consequently, when a stock dividend is declared, the fact that the directors might have chosen to declare a larger one if it had not been for the payment of the taxes the company had made on its own property, is entirely immaterial. So is the fact, if it be a fact, that the total stock dividend was reduced by the amount which the company had theretofore paid as a tax upon its undistributed surplus (p. 259).

It was of course unimportant whether the tax upon the railroad company's business was a direct or indirect tax upon Logan County's property. If it was a tax on that property at all it was invalid.

The same result follows from the Inheritance Tax Cases.

> *Knowlton* v. *Moore*, 178 U. S. 41.
> *Plummer* v. *Coler*, 178 U. S. 115.
> *Murdock* v. *Ward*, 178 U. S. 139.
> *United States* v. *Perkins*, 163 U. S. 625.
> *Snyder* v. *Bettman*, 190 U. S. 249.

As already stated, these cases held that the tax was on the transmission and receipt of the legacy or inheritance, not on the legacy or inherited property itself. In the last two of the cited cases this proposition was

adjudged sufficient to support the tax, though in on
of the cases it was imposed by the United States con
cerning a legacy to a municipality of a state and in th
other of the cases the tax was imposed by a state con
cerning a legacy to the United States. If a tax upo
transmission and receipt of a legacy does not legall
fall upon the legacy, a tax upon a business (which lie
back of transmission of any part of the business prop
erty or profits to its shareholders) is not a tax upo
the stockholders' shares or income from their share

III.

Finally, even a tax laid directly on corporate prop
erty is not a tax on the separate shares of the cor
poration's stock.

This is directly involved in—

Owensboro National Bank v. *Owensboro*
173 U. S. 664.

New Orleans v. *Citizens' Bank*, 167 U. S
371.

Home Savings Bank v. *Des Moines*, 20
U. S. 503.

In *Owensboro National Bank* v. *Owensboro* it wa
said:

> It is, however, urged that whilst the taxe
> may not be in form imposed on the shares o
> stock in the names of the shareholders, an
> may be in form a tax on the franchise o
> property of the bank, nevertheless they ar
> equivalent to a tax on the shares of stock i
> the names of the shareholders, and therefor
> do not violate the act of Congress. But thi

proposition concedes that the taxing statute does not conform to the act of Congress, and yet invokes its permissive authority, since, as already shown, without the grant made by the act of Congress there would be no power to tax at all. Passing, nevertheless, this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? is the question.

To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the States to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders. A brief review of the two classes of cases, by which the doctrines just stated are overwhelmingly established will make the foregoing result clear (pp. 676, 677).

And again:

> Whilst this conclusion suffices to dispose of the case, we advert to the contention that although there may not be a legal equivalency, there is nevertheless one in fact, and therefore the tax should be sustained. It may be that in the case before us, there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of Congress. But that this is not the necessary result of the taxing statute is too plain to require comment. The fact that it is not is well illustrated by *Henderson Bridge Company* v. *Kentucky, supra*, for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total of the capital stock, and proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration (p. 683).

In *New Orleans* v. *Citizen Bank, supra,* it was said:

> The doctrine that an exemption of the capital of a corporation does not, of necessity, include the exemption of the shareholders on their shares of stock is now too well settled to be questioned. *Bank of Commerce* v. *Tennessee,* 161 U. S., 134, 146; 163 U. S., 416 (p. 402).

In *Home Savings Bank* v. *Des Moines, supra,* it was said:

> One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the State has the power to levy one and has not the power to levy the other. The question here is one of power and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence. Precisely the same argument was made and rejected in *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664. There it appeared that a tax upon the intangible property of a national bank had been levied under the name of a franchise tax. Such a tax upon one of the agencies of the National Government is beyond the power of the State.

> But it was contended that although the tax was not in form upon shares in the hands of shareholders (a tax lawful by the permission Congress has given), it was the equivalent of such a tax. To this contention the court, by Mr. Justice White, replied: [Repetition of substantially what is quoted above.] These words apply with equal force to the case at bar (pp. 519, 520).

The converse proposition, that a tax on shares is not a tax on the property of the company, is also settled.

> *Van Allen* v. *Assessors*, 3 Wall. 573.
> *People* v. *Commissioners*, 4 Wall. 244.
> *Bradley* v. *The People*, 4 Wall. 459.
> *National Bank* v. *Commonwealth*, 9 Wall. 353.
> *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111.

The chief practical question in these cases was whether taxation of the shares of a national bank is taxation of the property of the bank itself, with the result that the value of United States bonds (exempt from state taxation) owned by the bank should be deducted from the taxable value of the shares; and it was held that no deduction of the value of the bonds from the value of the shares was necessary, because taxation of the shares is not a tax on the bonds owned by the bank. The cases really rest, therefore, on the very proposition now important, *i. e.*, that the property of the company is not owned by the shareholders; so that taxation of that property is not taxation of the shares. Still more clearly, taxation of the business of the company is not taxation of the shares.

THIRD.

The tax does not become direct in the special case of a company engaged mainly, or even solely, in the business of handling or dealing in real estate.

There are five cases at bar in which appellant is a shareholder of a corporation handling or dealing with real estate alone; though some of these companies seem to have charter power to do other things. These cases are: *Cedar Street Company* v. *Park Realty Company*, No. 757; *Brundage* v. *Broadway Realty Company*, No. 784; *Phillips* v. *Fifty Associates*, No. 797; *Mitchell* v. *Clark Iron Company*, No. 800; and *Cook* v. *Boston Wharf Company*, No. 819. The particular powers and activities of each company will be considered later (IV, *infra*), but the general considerations which affect them all must first be presented.

I.

The *only new inquiry* that is necessary now, beyond what has been said in the First and Second Points, is *whether the stated companies are "carrying on or doing business,"* within the language of the statute. There is no new problem concerning the constitutionality of the statute; because, if the companies are conducting a business, that business may be made the subject of a tax as well as any other business, and the tax on the business is no more a direct tax upon property used in the business because that property happens to be real estate than in any other case. A tax on the business of buying and selling

dry goods or of renting horses and carriages (even without supply of a driver) is not a direct tax on the dry goods or the horses or carriages themselves; and, if so, why is a tax on the business of buying and selling or renting realty a direct tax on the land?

The specific nature of the question whether the tax under discussion falls upon the operations of these companies dealing in real property is not constitutional, but interpretative. Do those operations come within the statutory phrase "carrying on or doing business?" If so, the previous argument meets all constitutional objection. On the other hand, if any particular company is not conducting a business, it is not within the language of the statute; and it escapes the tax because the statutory language does not reach it—not because the statute in any respect is invalid.

II.

The answer to the question whether a particular company is "carrying on or doing business" must be given on the special facts of each case. Exact statement of a general rule is probably impossible, as is often true in consequence of the complexity of human affairs.

Further, as the escape of any particular company from the tax must result from consideration of the nature of its particular activities and from a conclusion that those activities do not constitute a business, such avoidance of the tax by the particular company will rest upon grounds justifying the inap-

plicability of the tax to it; and therefore that result can have no possible influence upon the general validity of the enactment.

III.

What is a business? The impracticability of a precise general response has already been confessed. A reference to the definitions of "business" in the leading lexicons will lead to only one valuable conclusion, viz, that the word "business" is of the widest import and embraces nearly all of man's activities with a view to procurement of a livelihood or derivation of profit. Beyond the fundamental idea that a business is for gain, however, three other elements perhaps may be indicated—

(1) A representation, in one way or another, to the public that the persons engaging in business propose certain activities; (2) a definite scope for those activities, however wide, instead of a mere unplanned and unconnected miscellaneousness of operations; and (3) an actual or intended continuity of action, instead of mere isolated transactions. These characteristics are not offered as the only or as minutely accurate determinants in all cases of the question whether a business exists; but it is submitted that when these general features are found, in a substantial and unmistakable way, they will manifest the existence of a business.

How is it then with corporations and joint stock companies? Their members form a *common purpose* of entering into activities of one or another kind; and

that purpose is expressed always and necessarily in articles of incorporation or association. The contemplated activities are given and must *follow a definite range;* which likewise is expressed in the articles of incorporation or association. The contemplated activities also are intended to be *continuous, or to form a connected series,* instead of being casual and distinct. How can it be said that a business does not result?

Looking in more detail to the formation of a corporation or joint stock company and to certain constant elements in their method of action, a business will inevitably be found. Union and cooperation of several in a single enterprise always exists except in corporations sole, which are not known to operate for profit. Each member of the corporation or joint stock company therefore really stipulates for and employs in some degree the judgment and effort as well as the capital of his cooperators. A mutual agency, in a wide sense, is always involved. The capital contributed by each is used with that supplied by others, and all of it is used for the benefit of all members of the corporation or joint stock company. That capital, with such accretions as it may receive in the course of operations, is tied to the undertaking both legally and practically—as already has been described—and can be withdrawn from the undertaking only by the consent of all or a definite part of the business proprietors through definite action to that end. Beside the mutual agency of those who undertake the enterprise, a

corporation or joint stock company involves the creation and employment of other agents, who conduct most of the affairs of the enterprise on behalf of its proprietors. The judgment and skill and labor of those general agents are utilized. Subordinate employes are used in the general operations, and often many of them. A definite direction is given to every act of the members of the corporation or joint stock company, and of their general agents and subordinate employes, by the nature of the corporation or joint stock company itself. Even dissolution of the enterprise is beyond the power of any individual, and must be decreed by consent of the requisite number. Is there anything in this situation which is like ordinary ownership or enjoyment of property? Can a tax upon the aggregated activities of the business proprietors and their agents and employes, with the aid of an aggregated and delimited capital, be viewed as a direct tax on property? And does it make any difference that all the activities and all the capital are employed about real estate instead of dry goods or the freight cars of a private car company (which rents them), or rented pianos, or billiard tables and bowling apparatus which the public use for hire?

The truth is that the very existence of a corporation or joint stock company—unless the company is not formed for profit—implies a business. *The formation of a corporation or joint stock company is founded upon an agreement to create a business.* There is no such difficulty in that case as may exist in reference

to the transactions of a single individual. Even a partnership for profit makes a business out of the contemplated operations of the partners, whether or not like operations by the individual partners separately would be a business. Any claim that a corporation or joint stock company is not in business disregards the character which the members of the corporation or joint stock company by agreement among themselves have given to their joint operations.

IV.

All of the companies considered in this point are admittedly corporations, have shares, and operate for profit. It is important, however, to consider their charters and operations in a little detail.

1. As to the Park Realty Company (No. 757):

This company, according to the bill, was chartered—

> to purchase or otherwise acquire, hold, own, maintain, *work, develop,* sell, convey, mortgage, or otherwise dispose of real estate and real property and any interest and rights therein; generally to purchase, take on lease or in exchange, hire or otherwise acquire any real *and personal property,* and any rights or privileges which the company may think necessary or convenient for the purpose of its business; to *erect, alter, or improve buildings;* to *conduct, operate, manage,* or lease *hotels, apartment houses, or warehouses;* to make, enter into, perform, and carry out *contracts for constructing, altering, decorating, maintaining, furnishing,*

> *fitting up, and improving buildings* of every sort and kind; to advance money to and enter into contracts and *arrangements of all kinds with builders,* property owners, and others; to carry on in all their respective branches *the businesses of builders or contractors;* to purchase for investment or resale, and to sell houses, lands, real property of all kinds, and any interest therein, and generally to deal in, sell, lease, exchange, or otherwise deal with lands, buildings, *and any other property,* whether real *or personal;* to carry on any or all of the businesses hereinabove specified (Rec., 3).

The italicized portions of the quotation from the bill are worth noting. It appears that the company has varied and broad powers of trading in real estate generally; continuous operations in those ways are contemplated; specific power is given to operate and manage hotels, apartment houses, and warehouses; the company may act as a building contractor or as a decorator and furnisher of all kinds of buildings; it may carry on "in all their respective branches the *businesses* of builders or contractors;" it may trade in personal property as well as realty; and the articles of incorporation expressly designate the company's operations as "the businesses hereinabove specified."

The bill states that the actual activity of the company at present relates to "the Hotel Leonori," and that the company "is engaged in no other business except the *management* and leasing" of that hotel. The bill therefore expressly pronounces the company's dealings with the hotel to be a "busi-

ness;" and, while the details of the matter are not shown, the company obviously reserves some power of management of the hotel.

2. As to the Broadway Realty Company (No. 784):

The bill says that the company "was formed for the purpose of owning, holding, and *managing* real estate" (Rec., 1). It owns an "office building" situated on Broadway "and also certain securities;" and it is "engaged in the business of *managing said building*," etc. (Rec., 1). The bill also admits these operations to be a business, saying that the company "is engaged in no other business whatever" (Rec., 2). Owners of office buildings, who let out the space in the building to numerous tenants, reserve large powers of management; and, beyond that, they regularly *furnish light and heat* beside the space, and they *perform much service for the occupants of their building, such as janitor service, elevator service, cleaning, and repairing.*

3. As to the Fifty Associates (No. 797):

The company is chartered to own real estate "with full power to build, improve, alter, pull down and rebuild, and to *manage*, exchange and dispose of the same" (Rec., 3).

The bill alleges "that the business of said corporation, so far as it may be called a business, is the holding and *managing* of the property aforesaid" (Rec., 3); and that property includes "such amounts of income as may from time to time have been set apart as surplus or reserved for working capital or such

income as may have been accumulated but not declared in dividends" (Rec., 3).

4. As to the Clark Iron Company (No. 800):

This company is alleged by the bill to have been chartered under and by virtue of the provisions of chapter 28 of the general laws of Minnesota for the year 1876 (Rec., 2). That statute is entitled "An act to authorize the formation of corporations for mining and smelting ores, and for manufacturing iron, copper, and other metals." Obviously, therefore, it allows incorporation only for a mining, smelting, or metal-manufacturing business. Section 1 of the act declares that "any number of persons not less than three, desiring to form a corporation for the purpose of mining or smelting ores, or minerals, or for both purposes; or for the purpose of manufacturing iron, steel, copper, or other metals, may do so upon complying with the provisions of this act." Section 3 provides that when the prescribed articles of association have been filed, "said corporation shall be deemed to exist under this act for the purposes specified in said articles as a *manufacturing and mechanical* corporation, under the constitution and laws of this state." (General Laws of Minnesota, 1876, p. 44.) By section 6 the stock of the corporation is expressly made personal property, as in the absence of contrary statute the common law is believed to do concerning all corporate shares. From all these provisions it is patent that the company can not lawfully exist except for a business purpose.

The bill alleges that the company owns various tracts of land and that it "some years ago made explorations for iron ore upon the lands hereinbefore described, or some portion thereof, and caused *explorations and developments* to be made thereon, resulting in the discovery of *large bodies of iron ore* in said premises, or some portions thereof" (Rec., 2, 3). The ore lands "have been leased to other parties or corporations *for the purpose of carrying on mining operations* thereon and taking out and removing iron ore" (Rec., 3); and therefore the lease contemplated, and doubtless directly required, mining operations through which the company gets an income "*on a royalty basis upon the iron ore mined and removed*" from the lands (Rec., 3). As the company's lease of the lands requires mining operations and those operations are done in substantial part for its benefit, because it receives a royalty dependent upon the ore mined, and indeed the property is being necessarily consumed in the course of the mining operations, a business evidently exists. In fact, the company's charter estops it to contend otherwise.

5. As to the Boston Wharf Company (No. 819):

It was chartered to acquire "certain lands and flats, with their privileges and appurtenances," and to "lease, *manage, and improve* its property in whatever manner shall be deemed expedient by it." (Rec., 2.) The charter also authorizes it to "receive dockage and wharfage for vessels laid at its wharves." (Rec., 2.) The bill states that it has an income "*in*

the maintenance and operation of its business and properties" (Rec., 2).

The transactions of this company therefore directly embrace the management and operation of a wharfing business. Reference here may be made to the decision in *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S. 397, that wharfage charges received by the sugar company for the use of docks owned by it could and should be included in the computation of the gross income, which measured the excise on its business, though the tax was limited to the particular operations "of refining petroleum or refining sugar or owning or controlling any pipe line for transporting oil or other products" (pp. 410, 414, 415).

This very Boston Wharf Company was before the Supreme Court of Massachusetts in the cases of *Commonwealth* v. *Hamilton Manufacturing Company* and *Commonwealth* v. *Boston Wharf Company*, 12 Allen, 298. The litigated question was whether a tax on the excess of the market value of all the capital stock of the corporation above the value of its real estate and machinery was an excise upon the corporate franchise or a tax upon the corporate property, the court stating that under the constitution of Massachusetts the tax would be valid as an excise on the franchise but invalid if it was a tax upon property (p. 300). After a careful discussion of that question, it was concluded by the court that the tax was an excise on the franchise, and the following language of the opinion well indicates the funda-

mental difference between a tax on the corporate property and a tax on the results of the corporate business (to which the property contributes as only one of many factors):

> The market value of the shares of a corporation, or the aggregate market value of all the shares, by which we understand the cash price for which the shares will sell in the market, does not necessarily indicate the actual value or amount of property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property, or it may fall very far short of it. Undoubtedly the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospect of its future success, the nature and extent of its corporate rights and privileges, and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a corporation, on its capacity to avail itself profitably of its franchise, and on the mode in which it uses its privileges as a corporate body, which materially influences and often controls its market value (pp. 302–303).

This language describes some of the many factors, apart from property, which determine the profits

or income of a business as truly as they determine the value of the corporate shares.

The various cases now at bar well illustrate how a business may exist none the less because real estate is chiefly or solely used in that business.

V.

Scholey v. *Rew*, 23 Wall. 331, sustained a tax upon the "devolution of title in real estate," whether by "will, *deed*, or laws of descent;" and that case has never been overruled or questioned. If a single transaction with reference to real estate may be made the subject of an excise, surely continuous, varied, and extensive operations with reference to realty may be aggregated as a business and an excise laid thereon. The use of real estate in business may as well be made the subject of a tax when realty alone is used in the business as when both realty and personalty are so employed. It may be questioned, however, whether real estate ever is actually used alone in business; other funds quite universally, if not inevitably, are employed with it in the business.

What becomes of the stamp tax on deeds and conveyances of real estate if an excise can not be laid upon transactions involving real estate alone? Such taxes have never been overturned and seem never to have been questioned. The famous British Stamp Act of 1765 provided for a stamp tax of 1s. 6d. upon deeds and instruments conveying or assigning real estate within the Colonies. (5 George

III, c. 12; 26 Statutes at Large of England, 179, 183.) Of course such a tax is nothing more or less than a tax upon the transmission of realty. As early as June 9, 1794, Congress passed an act which shows that the public men of this country immediately after adoption of the Federal Constitution had no idea that a tax upon the sale of realty was a direct tax needing apportionment. That law provided for a tax "of one-fourth part of a dollar for every hundred dollars of the purchase money arising by sale at auction, of any interest, right, or estate in any lands, tenements, or hereditaments, and of any utensils in husbandry," etc. (1 Stat. 397, c. 65). By the act of July 16, 1866, it was provided: "Real estate agents shall pay ten dollars. Every person whose business it is to sell or offer for sale real estate for others, or to rent houses, stores, or other buildings or real estate, or to collect rent for others, except lawyers paying a special tax as such, shall be regarded as a real estate agent" (14 Stat. c. 184, p. 118). Recently the war revenue act of June 13, 1898, imposed a stamp tax upon every "deed, instrument, or writing whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction" (30 Stat. 460). Another stamp tax was put by the same act on a "lease, agreement, memorandum, or contract for the hire, use, or rent of any land, tenement, or portion thereof" (30 Stat. 461).

Beyond all this, the present tax is not laid on business conducted concerning real estate in ordinary ways and under ordinary conditions; it applies only to business when conducted in the special methods and with the peculiar advantages resulting from the special rules of law relating to a corporation or joint-stock company. Such question of uniformity as is involved through this fact will be treated later; but now the point is that transactions in reference to real estate may well be the subject of an excise when carried on under the peculiar conditions and with the special advantages which the law attaches to the operations of a corporation or joint stock company, even though like transactions by natural persons are not taxable. For a single example of the difference, the members of a corporation incur no liability, or only a limited liability, if the corporation makes a warranty deed.

The language of Mr. Chief Justice Fuller in *Thomas* v. *United States*, 192 U. S. 363, is here pertinent: "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates" (p. 371). *This case necessarily involves either that a tax by the United States upon the sale of property is not a direct tax upon that property or, at any rate, that a tax upon the sale of property in the exercise of special and peculiar privileges is not a direct tax on the property.*

The proposition that a Congressional tax on the transfer of property under conditions of special ad-

vantage is not a direct tax on the property was also expressly held in *Nicol* v. *Ames*, 173 U. S. 509; the tax in that case being laid upon the sale of "any products or merchandise at any exchange or board of trade, or other similar place" (p. 513).

FOURTH.

The tax is not an infraction of the general power of the States to authorize the formation of corporations and joint stock companies.

I.

This question is concluded by the authority of this court.

(*a*) It was directly involved and necessarily decided in

Railroad Co. v. *Collector*, 100 U. S. 595.
United States v. *Erie R. R. Co.*, 106 U. S. 327.
Spreckels Sugar Refining Co. v. *McClain*, 192 U. S. 397.

It is true that the question passed in those cases without contention by counsel or attention from the court. Nevertheless it was in the cases. The railroad companies in the first two of the cases were state corporations; and so was the Spreckels Sugar Refining Company. The tax in each case, as already shown, was on the business of the corporation; as is the present tax. No distinction can be made between the cited cases and the one at bar.

(*b*) The question was put forward in

Veazie Bank v. *Fenno*, 8 Wall. 533; 547.

After pronouncing the tax to be an excise on the business of the bank (which was a corporation of Maine), Chief Justice Chase, for the court, treated the matter thus:

> Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?
>
> We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.
>
> But in the case before us the object of taxation is not the franchise of the bank, *but property created, or contracts made and issued under* the franchise, or power to issue bank bills. A railroad company, *in the exercise* of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State

> as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are *means of profit to the corporations which issue them;* and both, as we think, may properly be made contributory to the public revenue (pp. 547, 548).

The language which we have italicized is noteworthy. It shows that the question in hand was answered, in the cited case, by taking a distinction between taxation of corporate franchises themselves and taxation of things done under the franchises, *i. e.*, the actual use or exercise of the franchises. That distinction is maintained as to a strictly analogous question in the cases next to be cited.

(*c*) Little is left to be said after a consideration of *Knowlton* v. *Moore*, 178 U. S. 41; 59–61.

It was there contended against the Federal inheritance tax that the United States could not impose a burden on the exclusive power of the state to regulate, and indeed to create, the right of succession to a decedent's property. The court, through Mr. Justice White, answered:

> But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property

occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State can not be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are sub-

ject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto can not be taxed by Congress, even in the form of a stamp duty. It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland* (4 Wheat., 316, 431), "that the power to tax involves the power to destroy." This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of

all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system both the National and the State governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established. The contention was adversely decided in the License Tax Cases, supra, where (p. 470) the court said: "We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued, for the defendants in error, that a license to carry on a particular business gives no authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must, therefore, be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed." The court, after thus stating the

> argument, decided that the license was a mere form of excise taxation; that it conferred no right to carry on the business (the selling of lottery tickets and the liquor traffic) if forbidden to be engaged in by the State,. but license was applicable whenever under the state law such business was permitted to be done. Many other opinions of this court have pointed out the error in the proposition relied on, and render it unnecessary to do more than refer to them (pp. 59–61).

The distinction once more is found between taxation of the state's legislative act in creating the right to inherit property (whether or not the designated person chooses to exercise that right) and the actual, beneficial exercise of that right by the person who elects to accept the inheritance. It is, the court says, "the exercise of such rights" created by the state that can be taxed by the United States. As further said by the court, the state regulates and really creates the right to make conveyances and contracts generally, and even the right to have property at all, but the actual use of the right regulated or given by the state, in the act of making a conveyance or contract or in the production or acceptance and enjoyment of property, may be taxed by the United States.

A corporate franchise is no more a creation of the state than is the right to inherit property. Indeed, it is no more a creation of the state than the right to make contracts and to have property. Specifically, on the very subject of business with which we are engaged, the right to do business under a corporate

franchise is no more a creation of the state than is the right to do business as a partnership. If a tax levied by the United States may be imposed upon the *use or enjoyment* of the right to do business as a partnership, or upon *the use or enjoyment* of the right to receive property by inheritance or to make contracts or to have property at all, such a tax may equally be levied upon the *use and enjoyment* of a corporate franchise. No distinction is possible.

(*d*) Other decisions of this court directly show the right of Congress to tax the exercise of privileges resulting from incorporation.

In *Thomas* v. *United States*, 192 U. S. 363, a Federal tax on transfer of corporate shares was upheld, and the court said:

> The sale of stocks is a particular business transaction *in the exercise of the privilege afforded by the laws in respect to corporations* of disposing of property in the form of certificates (p. 371).

The particular corporation whose stock was subjected to the transfer tax was of state creation.

In *Nicol* v. *Ames*, 173 U. S. 509, the board of trade, upon the enjoyment of whose privileges the Federal tax was laid, was incorporated by Illinois.

II.

While this tax is not on the corporate franchises, but on the exercise or use of those franchises, yet even a tax on the franchises of a state corporation is not a tax on the legislative power of the state or on the exertion of that power in an act of legislation.

1. A corporate franchise grows out of two things: (1) legislation by the state, which *offers* a franchise, and (2) *an act of free choice or election, in accepting the offer,* by persons to whom the offer is extended. The sole function of the state is in creating the *opportunity* for incorporation, either by special or by general offer of that privilege. The real act of incorporation, without which no franchise comes into being, is in the proceedings voluntarily taken by the private incorporators to avail themselves of that opportunity. Here we have a vital difference from ordinary and real legislation, which operates in given conditions without the consent of those upon whom it operates. For example, a statute that no man shall steal, or that hotels shall have external fire-escapes, operates or becomes effective by its own force alone. The law is complete in itself, and works its own results. To the extent of giving *opportunity* for incorporation, the same is true of a law allowing incorporation; but such law does not of itself create the corporation or any of its franchises. The corporation and its franchises arise from a supplementary and voluntary act of private persons. The state, in permitting incorporation, does not say that there *shall* be a corporation, but merely that there *may* be. Whether there shall be, in fact, rests in private choice. The corporation and its franchises therefore are ultimately and fundamentally created by the persons who decide to take advantage of the law which merely permits incorporation; just as a partnership is created by act of the persons who decide to form it under the permissive

rules of law. It could as well be said, therefore, that the United States can not tax a partnership contract—or, indeed, any other contract—as that it can not tax corporate franchises, on the theory that the state has the right to create and does create those franchises. The state has the right to *allow*, and does allow, their creation; but it has not the right itself to *create* the franchises, and does not in fact create them.

Even private persons, citizens of the legislating state, may therefore wholly prevent the existence of any business corporation, notwithstanding legislation by the state which allows their existence. Can not the United States then tax the act or the result of accepting offered franchises—because such tax may perhaps in some cases deter acceptance of the franchises—when individuals may and do act independently of the state in deciding whether or not a corporation shall in fact be made? May not the United States burden, if even private persons may wholly prevent, the actual existence of corporations or their franchises?

The reasoning of *Knowlton* v. *Moore*, 178 U. S. 41, 56–61, is again conclusive. It is as pertinent to show that Congress may tax the franchises of a state corporation as to show that it may tax the exercise or use of those franchises in the actual business. The corporate franchises, as we have just seen, do not arise directly or really from the state's legislative act, giving mere opportunity for incorporation,

but from the actual use of that opportunity by the persons who elect to incorporate. The corporate franchises are the outgrowth of the *use or exercise* by private individuals of the privilege of incorporation offered by the law; in the same way as receipt and enjoyment of a legacy or inheritance are the outgrowth or result of the *exercise* of the privilege of taking by *post mortem* succession, which is offered by the law.

2. No authority can be found that holds or even suggests that the United States cannot tax the franchises of a state corporation established for ordinary business purposes, on the theory that such Federal tax will interfere with the legislative independence of the states in their own sphere. The cases holding that a state cannot tax franchises or business of a bank created by the United States, or of railroads chartered by Congress, or of a telegraph company which (while incorporated by a state) has been made a governmental agent as well as an instrument of interstate commerce under Congressional legislation, are in no way pertinent in the present connection. Three distinct reasons so show—

(*a*) These cases are

McCulloch v. *Maryland*, 4 Wheat. 316.
Osborn v. *United States Bank*, 9 Wheat. 738.
Thomson v. *Pacific R. R. Co.*, 9 Wall. 579.
Union Pacific Railroad Co. v. *Peniston*, 18 Wall. 5.
California v. *Pacific R. R. Co.*, 127 U. S. 1.
Telegraph Company v. *Texas*, 105 U. S. 460.

In each of these cases the bank or the railroad or the telegraph company had been made, as this court expressly declared, *an agent of the United States Government for performance of governmental functions.* The cases therefore have nothing to do with the present general question, concerning the right of Congress to tax the business or franchises of state corporations doing the miscellaneous kinds of ordinary business. We shall make, in the Fifth Point (which immediately follows), the proposition that the cases just cited, though they show the bank, railroad and telegraph concerned in them to have been made governmental agents of the United States, fail altogether to show that banks, railroads and telegraph companies become governmental agents of the states in consequence of their incorporation by the states; but for the point now in hand that question is unimportant. We are dealing now with the general right of Congress to tax the business or franchises of state corporations in general; and the cases above cited are deprived of any bearing upon that question through the fact that they rested upon the relation of the bank, railroad or telegraph company to the United States as an agency for performance of governmental functions of the United States. Indeed, if any corporation can be formed constitutionally by Congress for mere private or business (as distinguished from governmental) purposes, the taxability of the business or franchises of such corporation by the states need not be disputed, except as the business of that corporation may happen

to be interstate. Chief Justice Marshall, in *Osborn* v. *United States Bank*, 9 Wheat. 738, admitted the right of a state to tax a Federal corporation operating for private trade or profit. He said:

> The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true; the bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation.

The whole opinion of the court, in the case of *McCulloch* v. *State of Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, &c. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but can not breathe into it the vital spirit which

alone can bring it into useful existence. Let this distinction be considered.

Why is it that congress can incorporate or create a bank? This question was answered in the case of *McCulloch* v. *State of Maryland*. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it can not, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle, with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute. This distinction, then, has no real existence. To tax its facul-

ties, its trade, and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other (pp. 859–60).

(*b*) In the case of the railroads and telegraph company, whose franchises were held in the cited cases not to be taxable by a state, the decision was also compelled by the fact that such railroads and telegraph company were engaged in interstate commerce; and a state cannot tax even the business of interstate commerce, though Congress may tax the business of intrastate commerce notwithstanding the reserved rights of the states legislatively to regulate that business.

(*c*) Still another consideration is yet more general and vital. *It does not follow, and is not true, that the United States may not by taxation burden or hamper the operation of a state law, because a state may not by taxation burden or hamper the operation of a law of the United States.* The difference results immediately and simply from the supremacy of each power of the National Government over all powers of a state, whenever the two meet, and the correlative subordination of all state powers to each national power (Federal Constitution, Art. VI). For example, a state may enact an insolvency law, with provisions for discharge of debts, but such law must give way when Congress enacts a bankruptcy law. A state likewise may, in the absence of conflicting Congressional legislation, enact a law which in some way or degree affects interstate commerce; but that law

must fall when Congress legislates on the same subject. Especially—and with direct reference to the subject of taxation—a state tax law cannot burden or affect interstate commerce, because even the taxing power of a state is subordinate to the power of the nation to regulate interstate commerce; though, on the other hand, Congress can tax intrastate commerce, notwithstanding the reserved power of the state to regulate that commerce, because the taxing power of the United States is superior to the power of the state to regulate domestic commerce. Let us suppose, also, that both Congress and a state legislature impose a tax, as they may in well-nigh all cases, upon the same thing. Then the taxing powers of the United States and a state directly meet; and, if the thing taxed is not of sufficient value to yield both the amount of the Federal tax and the amount of the state tax, the supremacy of the national law will justify priority of the national tax claim over the state tax claim, with the result even that enforcement of the Federal tax may entirely defeat the state tax on the same thing. This is beyond argument; and it demonstrates, beyond possibility of doubt, that no inability of Congress to tax the business or franchises of a state corporation can be inferred from the inability of a state to tax the business or franchises of a Federal corporation.

This very question was considered by this court at the outset of the discussion concerning the power of a state to tax the operations of a Federal corpora-

ion; and Chief Justice Marshall said in *McCulloch v. Maryland*, 4 Wheat. 316:

> It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme (pp. 435–436).

On all three of the grounds just stated it therefore appears that the adjudications of this court concerning state taxation of the business or franchises of a corporate agent of the United States are irrelevant to the question of the power of the United States to tax the business or franchises of miscellaneous corporations formed under state laws.

III.

The case of *South Carolina* v. *United States*, 199 U. S. 437, is decisive of this question whether Congress may tax the business or franchises of an ordinary state corporation, as under the next Point it will also show the power of Congress to tax business activities of a state itself.

In that case the internal revenue tax imposed by Congress on retail dealers in liquors was held collectible on such business when conducted by the state of South Carolina, through its own agents and for its own account. If the activities of a state itself in ordinary business may be taxed by the United States, *a fortiori* may like activities of private persons for their own profit be taxed by the United States, though they are conducted under a special form of organization and with the advantage of special legal rules of right and obligation, which the state (with the consent of the business adventurers) extends to the business.

FIFTH.

The business of public service companies, such as railroad, street railway, telephone, telegraph, light, water, heat and power companies, is not intrinsically an operation of the state which created the company; and in no case at bar is the state shown, through any peculiar relations established between itself and the public service company, to have made the business of the company its own. Further, the United States may tax even a business conducted for or by a state itself.

The claim to which this point will respond is that in taxing the business of a railroad company or other so-called public service company—such as a street railway, telegraph, telephone, gas, water, electric light, heat or power company—the United States taxes the operations of an instrumentality created by the state for the performance, or at least for assistance to the state in the performance, of a function which is the state's own, either because that function necessarily belongs to the state or because the state has actually assumed that function; and that such a tax, burdening a legitimate operation of the state itself, is incompatible with the reserved sovereignty of the state. There are several answers to this claim:—

I.

The operation of a railway, street railway, telegraph or telephone line, gas, water, electric light, heat or power plant, and so forth, is not an intrinsic function of the state; nor has it actually been assumed as one of its own functions by any of the states which incorporated the so-called public service corporations whose cases are at bar.

We will present separately the two branches of this first answer.

1. Such business is not an intrinsic function of the state. Several considerations make this plain.

(*a*) The only operations which can be considered to belong exclusively to a state, with the result that nobody but the state can perform them, are the enactment of laws, the interpretation and application of laws, and the execution of laws. These operations are the essential business of the three fundamental branches of government—its legislative, judicial and executive departments. Nobody but the state can make laws or interpret and apply them or execute them; but other activities than these do not rest upon the state as a necessary consequence of the nature of the state, and may be left by the state to others than itself.

(*b*) If the operation of a railroad or the conduct of any other business, such as the so-called public service companies transact, were essentially a function of the state, then that business could not be done by anybody—whether a corporate or a natural person—without the consent of the state. Private persons, however, may engage, without incorporation and without assent of the state in any form, in the business of operating a railroad or telegraph or telephone line, or of supplying water, light, heat or power to the public generally.

1 Rorer on Railroads, Sec. 2, p. 8.

1 Elliott on Railroads, Sec. 1, p. 1.

McKee v. *G. R. Street R. Co.*, 41 Mich. 274, 279.

Moran v. *Ross*, 79 Cal. 159 (21 Pac. Rep. 547).

County of Santa Clara v. *Southern Pac. Ry. Co.*, 18 Fed. 385, p. 433.

Henderson v. *Ogden City Ry. Co.*, 7 Utah, 199 (26 Pac. Rep. 286).

Bank of Middlebury v. *Edgerton*, 30 Vt. 182.

Lawrence v. *R. R. Co.*, 39 La. An. 427.

In the matter of Kerr, 42 Barb. 119.

Indeed, the operation of a public hotel is as much a public business as is any public service company's business. So is the operation of grain elevators or of stock yards, each of which this court has adjudged to be a business "affected with a public interest." Can it be supposed that the assent of a state is necessary before private persons can enter upon such business?

(*c*) If *any one* of the many kinds of business transacted by public service companies—such, for example, as the operation of a railroad or a telephone—is necessarily a state function, so equally are *all*. No difference can be found in the degree of their usefulness or importance to the community that will justify considering one of these businesses to be a state function and others to be open to all who may choose to engage in them. The idea that the business of a public service company is necessarily a function of the state finds refutation, therefore, in the absurd extent to which the idea would have to be carried.

(*d*) If any such business, because of its very nature, belongs necessarily to the state, it must also result that the conduct of such business by unincorporated,

natural persons is an activity of the state itself. Mere incorporation will not make that a state function which is not the state's work if it is done without incorporation; and the fact that the persons who are conducting the particular business are unincorporated can not take away from that business the quality of a state operation if that business through its nature belongs to the state.

(*e*) Nor does the fact that the business of a railroad or of a telephone line or of a gas company is "affected with a public interest," so that its charges may be regulated by the state, and is for the "public use," so that private property may be taken by eminent domain for the uses of the business, show that the business is an activity of the state. Those special characteristics of "public-service" business neither result from nor lead to a view that the business is done by the state itself. Both the right of all members of the community to have the benefit of using a railroad or a telephone line or a gas company's plant, and the right of the state to regulate reasonably the terms on which all members of the community may use the railroad or the telephone line or the gas company's plant result from the fact that the persons who enter upon such a business *hold themselves out* as a common carrier or a transmitter of messages for the public or a purveyor of gas to the public at large. The origin and foundation of their general obligations to all persons alike were described by this court in *Munn* v. *Illinois*, 94 U. S. 113, as follows:

> This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Har. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control (pp. 125–126).

The public character of the business proceeds therefore from the act and announcement of those who engage in it—not from any view that those persons are acting as agents of the state in performing a function which belongs to the state. Further, the power of the state to regulate the charges of the

business comes from the agreement of those engaged in it to do that business for the benefit of all members of the community; since such an agreement would be illusory unless it included the stipulation that the business would be done upon reasonable terms. The offer to work for all would mean nothing if the terms upon which the work should be done could be made as exorbitant as the offering party might choose. Likewise—just as the right of any member of the community to participate in the benefit of any business "affected with a public interest" and the right of the state to regulate that business do not grow out of its being a function of the state—the public character of the business and the right of the state to regulate it do not lead to a conclusion that such business is a function of the state. The stated origin of those special incidents of the business forbids any such inference from their existence; and, beyond that, the ability of the state to regulate such business in the interest of all members of the community is in itself ample reason why the state need neither have nor take upon itself the function of doing such business.

(*f*) If the conduct of a railroad or of a telegraph or telephone line were a state function, from the very nature of the business, it would follow that in regulating the interstate transactions of the railroad or telegraph or telephone line the United States is interfering with a function and activity of the state. This leads inevitably to the dilemma—either horn of which is sufficient to dispose of the contention that

Congress cannot tax the transaction of business by a railroad or telegraph or telephone line incorporated by a state—that (1) the conduct of a railroad or telegraph or telephone line is not an activity of the state which incorporated the company, or that (2) Congress may interfere with that activity under its power to regulate interstate commerce. The taxing power of Congress is no less than its power to regulate commerce; and therefore it may be said at once, in anticipation of the other branch of this matter, that Congress by a tax can interfere with an activity of a state in conducting a railroad or telegraph or telephone line, *unless its recognized power of interference with the interstate transactions of the railroad or telegraph or telephone, under the commerce clause of the Constitution, is better explained by the fact that the business of the railroad or telegraph or telephone company is not an activity of the state.*

2. The states which incorporated such public service companies as are at bar have not in fact assumed the business of such companies as a function and activity of the state.

(a) The mere fact of incorporation of the persons doing business does not involve assumption of that business by the state. Incorporation does not alter the nature of the business so as to make that a governmental function which without incorporation is not. If it did, every business done by a corporation would at once become an operation of the state. That is absurd. Also, the contrary is involved in

Spreckels Sugar Refining Co. v. *McClain*, 192 U. S. 397, and in *Veazie Bank* v. *Fenno*, 8 Wall. 533; unless indeed these cases involve more, viz, that the United States may tax the business of a corporate agent of the state. The two companies, whose business was rightly taxed by Congress under the decisions in those cases, were incorporated by Pennsylvania and Maine, respectively.

(*b*) It is true that incorporation by Congress makes the corporation in some way or for some purpose a governmental agent of the United States; but that does not involve the merely apparent converse that incorporation by a state makes the corporation an agent of the state. Congress has merely an *incidental*, not a primary or independent, power to create corporations; but a state has general and independent power to allow incorporation, the exercise of which may be wholly unrelated to any other power of the state. Specifically, Congress cannot create a business corporation except in aid of its power over interstate commerce, and cannot create a railroad corporation except in aid of that power or of some other strictly governmental power, such as the carriage of the mails or of the armies of the United States. It follows that an act of incorporation by Congress cannot be valid unless the corporation is created as an instrument for furtherance of the governmental powers of the United States. That is the general and fundamental ground on which an act of Federal incorporation, if it is to stand at all, shows that the

corporation is an agent of the United States; and that principle underlies

McCulloch v. *Maryland*, 4 Wheat. 316.
Osborn v. *United States Bank*, 9 Wheat. 738.
Thomson v. *Pacific R. R. Co.* 9 Wall. 579.
Union Pac. R. R. Co. v. *Peniston*, 18 Wall. 5.
California v. *Pacific R. R. Co.* 127 U. S. 1.

No like principle affects incorporation by a state. It may be granted, and of course commonly is granted, without the slightest connection of the corporation with the operations of the state government.

Further, the case of *Reagan* v. *Mercantile Trust Company*, 154 U. S. 413 (pp. 416, 417), suggests that even incorporation of a railroad company by Congress does not relieve that company's intrastate business from control or taxation by the state in which that business is done. It was there held that the state of Texas could regulate the rates of a Federal railroad corporation on local business in Texas. In such business local to a state a Federal corporation may well be said not to be a governmental agent of the United States, though it is such agent in doing interstate business or in carrying the mails or armies of the United States; because in doing intrastate business the railroad is not acting as an instrumentality created by Congress in furtherance of its own governmental powers. More plainly still, however, a railroad chartered by a state need not be, and certainly in all ordinary circumstances is not, an instrumentality created by the state in aid of its governmental operations.

II.

Even if a state should actually assume the operation of a railroad, whether directly or indirectly through a special corporate agency, or should assume to do any other kind of business, the operations of the state in the business would be taxable by the United States.

1. This is settled by

South Carolina v. *United States*, 199 U. S. 437.

It was there held that the business of the state liquor dispensary of South Carolina could be taxed by the United States though it was conducted by and for the account of the state itself. The distinction between those operations of a state which the United States may not tax and those other operations of the state which the United States may tax rests upon the difference between the fundamental and essential activities of a state, which grow out of its very nature and by which it accomplishes what it alone can do, and other activities which have merely a business character, though the state assumes them in some regulative purpose.

Mr. Justice Brewer, for the court, said, in the *South Carolina* case, concerning the limitation upon the United States and states implied in the Constitution:

> Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the *ordinary functions* of government, just as it follows from the second clause of Article VI of the Constitution,

> that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it (pp. 451–452).

And, concerning the extent to which the states may go into business if they see fit and the consequent restriction of the taxing power of the United States if business done by a state should be held free from Federal taxation, it was said:

> The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co.*, No. 1, 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million dollars. *Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax.* If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.
>
> More than this. *There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system.* Would the State by taking into possession these public utilities lose its republican form of government?
>
> We may go even a step further. *There are some insisting that the state shall become the owner of all property and the manager of all business.* Of course, this is an extreme view,

but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, *in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government.* If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National

Government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland, supra*, (p. 431), for a complete answer:

"But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State.

There is something of a conflict between the full power of the Nation in respect to taxation and the exemption of the State from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government with only the limitations of uniformity and the public benefit. The exemption of the State's property and its

functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. *What, in the light of that condition, did the framers of the convention intend should be exempt? Certain is it that modern notions as to the extent to which the functions of a State may be carried had then no hold.* Whatever Utopian theories may have been presented by any writers were regarded as mere creations of fancy, and had no practical recognition. It is true that monopolies in respect to certain commodities were known to have been granted by absolute monarchs, but they were not regarded as consistent with Anglo-Saxon ideas of government. The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. While many believed that the liberty of the people depended on the preservation of the rights of the States, they had no thought that those States would extend their functions beyond their then recognized scope, or so as to imperil the life of the Nation. As well said by Chief Justice Nott, delivering the opinion of the Court of Claims in this case (39 C. Cl. 284).

* * * * *

Looking, therefore, at the Constitution in the light of the conditions surrounding at the

> time of its adoption, *it is obvious that the framers in granting full power over license taxes to the National Government meant that the power should be complete, and never thought that the States by extending their functions could practically destroy it* (pp. 454–457).

It must be always remembered that the right of South Carolina to enter into the liquor business was sustained by this court in the view that the state's assumption of the business was a legitimate exercise of its police power to regulate the liquor traffic in the interest of the health and welfare of its citizens; and therefore the business was assumed by the state as a means of effecting a regulative purpose.

> *Vance* v. *W. A. Vandercook Co.* No. 1, 170 U. S. 438.
>
> Dissenting opinion in *South Carolina* v. *United States*, 199 U. S. on pp. 464, 472.

If, then, a state enters into the business of running a railroad or a street railway or of operating a telephone or telegraph line or of supplying gas, electric light, heat or power to its citizens, it certainly will no more be exercising a governmental power than South Carolina was, in taking on the liquor business.

2. We have already argued (pp. 87–89 *ante*) that each power of the United States is superior to the reserved powers of the states, so far as the two come into conflict; and that, consequently, it does not follow from the mere fact that a law of the United States may hamper some operation of a state that the Federal law is invalid. No state law can hamper

the operations of the United States, because the powers of the states are subordinate to the national power; but the converse is not true—at any rate in every case. The illustration of a Congressional tax and a state tax put upon the same thing may be recalled. If the value of the thing taxed is insufficient to yield more than the Federal tax, the United States may take it all in satisfaction of its tax, though the state tax is thereby entirely defeated. If then even a power of the state so fundamental as its taxing power may be hampered by the taxing power of the United States, is there difficulty in concluding that the taxing power of the United States may be exercised though the tax will trammel some business upon which the states embark?

3. Finally, if the state itself operates a railroad or a telegraph or telephone line, may not the United States, under its power to regulate commerce, control or interfere with the interstate transactions of the state upon its railroad or telegraph or telephone line? And if the business activities of a state may be regulated by the United States under the commerce clause of the Constitution, are those activities beyond all reach of the still more fundamental, taxing, power of the United States?

III.

While the power of the United States to tax the business of a railroad company charfered by a state seems not to have been questioned heretofore in this

court, it was directly involved and impliedly sustained in

Railroad Co. v. *Collector*, 100 U. S. 595.
United States v. *Erie Railway Co.*, 106 U. S. 327.

The railroad company concerned in each of these cases was incorporated by a state and the tax was held to be an excise upon its business.

IV.

If the business of a public service company, incorporated by a state, could be deemed an activity of the state itself, and even if such activity of the state could be held to be beyond the taxing power of the United States unless the state should assent to the tax, still such assent by the state to taxation of the business by the United States would be inferred in the absence of legislative declaration to the contrary by the state.

This is involved in

Reagan v. *Mercantile Trust Co.*, 154 U. S. 413.

The Texas & Pacific Railway Company, incorporated by Congress, was there held to be subject to regulation by Texas in respect of its rates upon its local business in Texas. As already suggested, that result could well follow from considering the railroad company not to be acting as an instrumentality of the United States in its mere intrastate business—so that regulation of the local business in Texas was not an interference with any operation of an agent of the United States; but this court, conceding for the purpose of the argument that the state of Texas could not tax even the local business of the railroad

in that state without the consent of Congress, went on to say:

> Similarly we think it may be said that, *conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it,* and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. *Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to*

> *the ordinary control exercised by the State over such business.* Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State, passed in 1873 in respect to it, we are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of *taxation*, rates, and other police regulations (pp. 416, 417).

It is no more difficult to infer, from the silence of the states in reference to Federal taxation of the business of miscellaneous public service companies, that the states have contemplated and given their assent to such taxation.

SIXTH.

The tax is not imposed upon state or municipal bonds, or upon the income of such bonds, forming part of the business assets of the company whose business is taxed; and the company's income from such bonds is to be included in the computation of its net income.

It is admitted, of course, that the bonds of a state or of a municipality of a state cannot be made the subject of a Federal tax; nor can the income from such bonds.

> *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 583–586.

This is because the issue of such instruments of public credit is "an essential element of the sovereignty" of the state (*Pollock* case, p. 585). But that rule is not applicable to the present case. The

tax here involved is *not on the bonds or on their income, but is on the business* of the company which holds the bonds as part of its business assets, *and the income from such bonds as well as from the company's other business assets and activities is used only as a measure* of the amount of the tax on the business. This has already been treated.

The validity and sufficiency of this distinction between a tax on business and a tax on property are clear in principle, and the distinction is supported by many analogies which might be mentioned—as, for example, the fundamental contrast between an excise on business and a direct tax on property, and the rule that a tax on the shares of a national bank is not a tax on the property of the bank. Such collateral arguments need not be developed, however, as the decisions of this court amply cover the exact point in hand.

1. State taxation of the business of a bank, measured by its deposits, is not a tax on bonds of the United States, though the deposits are invested in such bonds.

Society for Savings v. *Coite*, 6 Wall. 594.
Provident Institution v. *Massachusetts*, 6 Wall. 611.

State taxation of the business of a bank, measured by the excess of the market value of the bank's capital stock above the value of its real estate and machinery, is not a tax on bonds of the United States in which the capital is invested.

Hamilton Co. v. *Massachusetts*, 6 Wall. 632.

2. A Federal tax of ten per cent. "on the amount of notes of any town, city or municipal corporation, paid out" by a national or state bank is not a tax on the municipal notes themselves.

National Bank v. *United States*, 101 U. S. 1.
Veazie Bank v. *Fenno*, 8 Wall. 533.

As stated by Chief Justice Waite in the former case—

> The tax thus laid is not on the obligation, but on its use in a particular way (p. 6).

3. A tax upon the "franchise or business" of a corporation or joint stock company, measured by its dividends, is not a tax upon bonds of the United States, though the capital of the company is invested in such bonds.

Home Insurance Co. v. *New York State*, 134 U. S. 594.

4. A tax of the United States on the inheritance of state bonds is not a tax on the bonds themselves, though their value measures the tax.

Murdock v. *Ward*, 178 U. S. 139.

In like manner, a state tax on the inheritance of United States bonds is not on the bonds themselves, though their value measures the tax.

Plummer v. *Coler*, 178 U. S. 115.

5. A state tax on shares of a national bank is not a tax on bonds of the United States in which the capital of the bank is invested.

Van Allen v. *Assessors*, 3 Wall. 573.
People v. *Commissioners*, 4 Wall. 244.

Bradley v. *The People*, 4 Wall. 459.
National Bank v. *Commonwealth*, 9 Wall. 353.
Cleveland Trust Co. v. *Lander*, 184 U. S. 111.

6. An anaolgy may be found in *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1.

It was there held that a license tax exacted by Tennessee from factors, brokers and buyers or sellers on commission doing business in the state could be collected from particular brokers who in a given year negotiated only sales of goods to be brought into Tennessee from another state, though the tax was measured by the amount of the factor's or broker's commissions. Similarly, a license imposed by a state upon liquor dealers generally is held properly chargeable (without reduction or apportionment) against liquor dealers making both domestic and interstate sales.

Tiernan v. *Rinker*, 102 U. S. 127.

No difficulty arises from the cases holding that a state tax directly levied on the property of a bank is invalid so far as it falls upon bonds of the United States forming part of that property. For example—

Weston v. *City Council of Charleston*, 2 Pet. 449.
Bank of Commerce v. *New York City*, 2 Black, 620.
Bank Tax Case, 2 Wall. 200.

In *Bank of Commerce* v. *New York City* the court said:

> According to that system of taxation [i. e., which determined the amount of the tax by the nominal capital of the bank without

> regard to its actual value at the time of taxation] it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system, it is agreed that the tax is upon the property constituting the capital (p. 629).

Of the *Bank Tax* case this court later said:

> Nothing more was decided in the *Bank Tax Case* than that a tax levied under a law of the State which enacted that all banks and banking associations should be liable to taxation on a valuation equal to the amount of their capital paid in or secured to be paid in, and their surplus earnings, in the manner provided by law, was a tax on the property of the complaining bank, and that inasmuch as the capital of the bank consisted of public securities, declared by act of Congress to be exempt from taxation, the law imposing the tax was unconstitutional and void. (6 Wall. 629.)

In the *Pollock* case, 157 U. S. 429, the direct subject of the tax was the income from state bonds as well as from other property, held as an investment; and the tax was not upon the conduct or transaction of a business, but was independent of the employment of the bonds or other property in business.

SEVENTH.

As an excise, the tax is uniform under clause 1 of section 8 of Article I of the Constitution of the United States, though it is laid upon other kinds of business than insurance only when the business is conducted by a corporation or joint stock company having shares of stock; and the imposition of the tax upon the business of such corporations and joint stock companies, while the kindred business of individuals and partnerships is not taxed, does not take property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and does not contravene any rule of equal legislation implied from the nature of the National Government.

I.

It is already settled that the constitutional requirement of uniformity in "all duties, imposts and excises" imposed by Congress (Clause 1 of section 8 of Article I of the Constitution) calls for no more than geographical uniformity.

Knowlton v. *Moore*, *supra*.

On that ground it was held in the cited case that the Federal inheritance tax of 1898 was uniform, though it exempted legacies and distributive shares of $10,000.00 or less, and though the rate of tax varied largely with the degree of kinship between the decedent and the recipient of the legacy or distributive share, and though the rate of tax also varied largely with the amount of the legacy or distributive share; the rate of tax in some cases being, as a result of these two rules of variation, over twenty times as high as in other cases.

II.

It would seem to follow from *Knowlton* v. *Moore* that the only inquiry open in the courts concerning an alleged Federal excise is—beyond its geographical uniformity—whether the charge is in its true nature a tax at all; for example, whether it is imposed for a public purpose or whether, instead of being a tax, it is a mere arbitrary taking of property under the false semblance of a tax. Concretely, it would seem that a tax imposed in like way and amount under *identical* circumstances, in all parts of the United States, is uniform, and that omission to impose the tax under circumstances differing in *any* real way from the circumstances in which the tax is imposed cannot create a lack of uniformity; though the difference in circumstances be of the slightest.

It is contended in this case, however, as it often has been contended in other cases, that the Fifth Amendment to the Constitution, which prohibits the taking of property without due process, or the essential nature of a free and republican government demands some other than merely geographical uniformity in Federal taxation. It is difficult to see how more can be requisite, either under the Fifth Amendment or in consequence of the nature of our Government, than that what is called a tax be in truth a tax—instead of mere, palpable spoliation. The Constitution having expressly prescribed, both as to direct and indirect taxes, such rule of uniformity as its makers and the people who ratified it thought

necessary and sufficient, viz, as to direct taxes, apportionment among the states according to population, and, as to indirect taxes, geographical uniformity, can any other rule of uniformity in what by its nature is a tax be implied in the Constitution? This question has been put by this court itself. In *District of Columbia* v. *Brooke*, 214 U. S. 138, the question was made in this way:

> The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists it must rest on all the powers conferred by the Constitution. This court, however, has just held, in the case of *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, that Congress may in the exercise of the powers to regulate commerce among the States, discriminate between commodities and between carriers engaged in such commerce. And it was said that the assertion that "injustice and favoritism" might "be operated thereby," could "have no weight in passing upon the question of power." In the case at bar we are dealing with an exercise of the police power, one of the most essential of powers, at times the most insistent, and

> always one of the least limitable of the powers of government (p. 149).

But for this language, which of itself strongly suggests that the express constitutional rules of uniformity in taxation exclude an implication of different rules, *Knowlton* v. *Moore* might well be taken as decisive; especially as, in *Patton* v. *Brady*, 184 U. S. 608, when again considering the uniformity of a Federal excise, this court said:

> Geographical uniformity being therefore that only which is prescribed by the Constitution the courts may not add new conditions, and the statute in question fully complies with that requirement. It is not the province of the judiciary to inquire whether the excise is reasonable in amount, or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final (p. 623).

Likewise, in *United States* v. *Singer*, 15 Wall. 111, *Knowlton* v. *Moore* was fully presaged. Counsel in that case (as their briefs show) insistently raised and debated the question whether any other than geographical uniformity is required in an excise; and the court, responding to that debate, said—

> The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be "uniform throughout the United States." The tax

> here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike (p. 121).

The maxim *expressio unius est exclusio alterius* applies with peculiar force to a constitution. Restrictions upon legislative discretion, beyond what the Constitution clearly establishes, cannot easily be recognized by the courts. Judicial inference of a restraint upon the act of a coordinate branch of the government, in legislation, is far different from like inference of a restraint upon private action imposed by the legislature. No such weight of unavoidable reason is necessary for the latter as is indispensable to the former.

Nor could the case well be stronger than it is for holding that the Constitution leaves all questions of tax uniformity to Congress, if only the charge be what is a tax in the general conception of civilized nations and the kind of uniformity expressly required by the Constitution exist. In the first place, direct taxes, on the one hand, and duties, imposts and excises, on the other hand, embrace all kinds of tax; and therefore the Constitution has applied an express rule of uniformity to every kind of Federal tax. In the second place, in all the controversy over the ratification of the Constitution the sufficiency of the expressly required uniformity in taxation does not seem to have been assailed. In the third place, when the amendments which grew out of the controversy over the

ratification of the Constitution were adopted, no nearer approach was made to the subject of taxation than the provision about due process in the Fifth Amendment. It is inconceivable that, if anything more than was expressed in the Constitution was desired to assure uniformity of taxation, some specific language on that subject, or at least some direct reference to the topic of taxation, would not have been inserted in the amendment. Finally, in the course of the proposal and adoption of all subsequent amendments to the Constitution, the original treatment of taxation has been left unchanged.

A practical answer, at any rate, has been given by this court to this question of the exclusiveness of the rule of geographical uniformity as to Federal excises. In no case has a congressional classification of persons or things for taxation been adjudged improper. The kinds of Federal excise imposed by Congress have been many, and the bases of Congressional choice, either of the subject of tax or of the applicable rate, have been sometimes slight and peculiar; controversy over them on this very point of uniformity has been frequent; and all have been sustained.

III.

However the court may view the question of the existence of any other than the express constitutional rule concerning uniformity in excise taxation, it must at least be true that any implied rule of uniformity will no more confine the discretion of Con-

gress in deciding what or how it will tax than the general language of the Fourteenth Amendment, prohibiting denial of the equal protection of the laws by a state, confines the state legislatures in their taxing discretion. In *District of Columbia* v. *Brooke*, 214 U. S. 138, this court said, after querying whether any other than the express rule of uniformity can be recognized:

> However, the question of the power of Congress, broadly considered, to discriminate in its legislation is not necessary to decide, for *whether such power is expressly or impliedly prohibited, the prohibition can not be stricter or more extensive than the Fourteenth Amendment is upon the States.* That Amendment is unqualified in its declaration that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." Passing on that Amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that *such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates.* A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws, *Billings* v. *Illinois*, 188 U. S. 97; *Heath & Milligan Manufacturing Co. et al.* v. *Worst*,

207 U. S. 338. In the light of these principles the contentions of defendant in error must be judged. The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *St. John* v. *New York*, 201 U. S. at pages 633, 637, not only the purpose of a law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, where a privilege to protest against a street improvement given by the statute assailed to resident property owners and denied to non-resident property owners, was sustained, and the statute held not to violate the equality clause of the Fourteenth Amendment. See *Travelers Ins. Co.* v. *Connecticut*, 185 U. S. 364 (pp. 150–151).

It is to be remembered, too, that, beside the Fourteenth Amendment, the Constitution contains the provision of section 4 of Article IV that "the United States shall guarantee to every State in this Union a republican form of government;" and that must

contemplate as much in reference to state taxation as the republican character of the National Government entails concerning national taxation.

IV.

With so much premised, it is time to consider the *exact question* of uniformity presented by the imposition of an excise on business done under the special conditions which surround and with the special advantages which attach to such business when it is transacted under the exceptional legal rules applying to corporations and joint stock companies, without imposition of the tax upon kindred business done under the different conditions and rules applying to individuals and ordinary partnerships. First let it be noted, however, that, if there be any such thing as a corporation or joint stock company not "having a capital stock represented by shares", the tax does not fall upon that company's business; and it will then appear at once that the important things which, on the one hand, differentiate the business of a corporation or joint stock company that is taxed under this act from similar business of individuals or a partnership make natural and justify, on the other hand, the classification of the business of a joint stock company with like business of a corporation in the taxed group of businesses.

1. The existence of transferable shares in the business and its property leads at once to an escape from the embarrassing consequences of the rule that there is a *delectus personarum* in a partnership. When, by

organizing either under a statute concerning joint stock companies or under the common law a business association with transferable shares, the business adventurers agree together that there may be indefinite substitution of new co-adventurers, the rule that a partnership is dissolved by death or bankruptcy of any partner or by transfer of his interest ceases to be applicable to the business, because the element of personal trust between the partners disappears. The immediate result is that a joint stock company, like a corporation, is not dissolved and its business remains unaffected by the death or bankruptcy of a stockholder or by a transfer of his shares. In this fundamental characteristic, therefore, the business of a joint stock company is done under the same conditions and with the same advantages as the business of a corporation; and the mere fact that the law views a corporation as having a new collective personality, while a joint stock company has not (in all cases; though under statutes it may have a sort of separate personality), is of no influence to distinguish a corporation from a joint stock company in respect of the continuity of its business notwithstanding changes in its membership. The existence of transferable shares in a corporation or joint stock company, with the resultant opportunity for a numerous membership and frequent changes of membership, also leads inevitably to the practical result, exemplified on all hands, that the management of the business of a corporation or joint stock company does not remain with the business adventurers themselves, as in a partner-

ship, but passes to special agents of the corporation or joint stock company (such as directors, trustees and general executive officers) created by the business proprietors in special ways and exercising peculiar powers, with the result that their transactions are governed by exceptional rules of law. Further, the other fundamental and highly advantageous feature which distinguishes the business of a corporation from that of individuals or a partnership, and which equally assimilates the business of a corporation and the like business of a joint stock company, is that the existence of transferable shares in the business and its property makes the tenure of the business property continuous and independent of changed membership in the corporation or joint stock company and independent also of changes in the circumstances of its members; so that the title of the business property, whose ownership depends upon the possession of shares, is unaffected (like the business enterprise itself) by the death or bankruptcy of any member of the corporation or joint stock company or by the transfer of his shares.

These things, which characterize the business of a corporation or joint stock company and differentiate it from that of individuals or a partnership, cannot be overestimated. Their existence alone makes possible the great and extended business enterprises of modern times. They alone make practicable the aggregation of large masses of capital in a single undertaking; and they alone assure the continuous use of the aggregated capital in an uninterrupted

enterprise. Argument on this is unnecessary. The practice of the world admits it. The rapid and almost unbounded multiplication of corporations and joint stock companies is due to their possession of the exceptional advantages which have been mentioned. No man to-day attempts, or can attempt, any large business project without the aid in the business of the special incidents, primarily legal but consequentially and controllingly practical, attending business done under the organization and with the special features of a company having transferable shares.

The business of a corporation is done under the further important advantage that its members are under no liability, or under a limited liability, upon corporate obligations; while individuals and partners in business are each liable *in solido* for the business debts. This is a great advantage, and would of itself suffice to justify a tax upon corporate business without its imposition upon kindred business done by individuals or a partnership. That advantage does not attach in the business of a true joint stock company; but that fact cannot at all lessen the importance or sufficiency of the differences already shown between the business of a joint stock company and the business of individuals or a partnership. The situation is simply that there is one more reason for differentiating corporate business from ordinary business than exists for like differentiation of the business of a joint stock company from ordinary business. That does

not prove the bases for differentiation of the business of a joint stock company from ordinary business to be inadequate. Indeed, the advantages peculiar to both corporations and joint stock companies, in contrast with ordinary business, are far more fundamental than the mere corporate incident of limited liability. The latter simply lessens individual risk in the enterprise, and so undoubtedly makes the enterprise more attractive to investors; but the common features and advantages of both corporations and joint stock companies give more than attractiveness to the enterprise; they alone make it possible as a large and lasting project.

The propriety of classifying corporations and joint stock companies together, for like taxation, is illustrated, and indeed concluded, by *Liverpool Insurance Co.* v. *Massachusetts*, 10 Wall. 566.

That case held an association of Great Britain to be a corporation, though its members were under unlimited liability for the business debts; with the result that a business tax could be put upon it by Massachusetts in an amount greater than was put upon the like business of companies created in another state or in Massachusetts. Mr. Justice Bradley, concurring in the result, held the company to be "one of those special partnerships which are called joint stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid" (p. 576). The difference does not affect the application of the case to our present question. If the

English company was a corporation, that conclusion shows that the fundamental likenesses which we have enumerated between a corporation and a joint stock company make unimportant their difference in respect of personal liability of their members. On the other hand, if this English company was a joint stock company, it then results that such a company may be taxed by a state in a discriminating way, because it is not, like natural persons, within the protection of section 2 of Article IV of the Constitution entitling the citizens of each state to all privileges and immunities of citizens in the several states.

Nor is it material, for the present case, whether or not the act under discussion taxes joint stock companies formed with transferable shares under the common law (as they may be; Palmer's Company Law, 4th ed., pp. 4–6; 2 Cook on Corporations, 6th ed., §504, p. 1364; *Phillips* v. *Blatchford*, 137 Mass. 510) or taxes only joint stock companies formed under a statute. The construction of the act in that respect depends upon the meaning of the words "organized under the laws" of the United States or a state or territory or Alaska or the District of Columbia or a foreign country. Inasmuch as, beyond doubt, joint stock companies having transferable shares may be formed under the common law, with most if not all of the special features and advantages which attach to statutory companies, we believe it beyond reasonable dispute that a joint stock company formed at common law is liable to the tax; because its business possesses the special qualities and

advantages which bring it within the reason of the statutory classification. The words "organized under the laws," etc., do not necessarily import a statute; the rules of the common law are laws. The substance of the matter should be held to illumine the language, instead of an ambiguous phrase being permitted to override essentials. Further than that, this phrase certainly will be construed so as to make the statute uniform in its operation and valid, if that be possible; and that reason in itself would suffice to induce an interpretation of the phrase "organized under the laws," etc., as inclusive of a joint stock company formed under the common law, if that interpretation be necessary to the constitutionality of the statute. However, if limitation of the statutory language to statutory companies be unavoidable, still complete uniformity may be maintained in the application of the law; because then the phrase "organized under the laws," etc., must be taken to mean companies *really* organized under a statute, in the sense of deriving from the statute some quality or incident which cannot be gotten under the common law; and uniformity therefore will remain, though the operation of the tax may be unfortunately restricted. There is no forcing of the language in making it mean, if necessary, a joint stock company deriving from a statute one or more characteristics which the common law would not give it; because a company which takes from a statute no more than it can get from the common law is not organized under the statute, in any real sense.

The statute in that case is merely declaratory of the common law.

2. Reverting to the differences which exist between the conditions and characteristics of business done by a corporation or joint stock company and the conditions and characteristics of kindred business done by individuals or a partnership—What do the decisions of this court show concerning their sufficiency as a basis for different taxation? Citation of all tax cases in which any question of uniformity has been made, whether under the original Constitution or under the Fourteenth Amendment, will be unnecessary; for the following specially pertinent cases, arranged in four groups, surely are enough:

(1) An excise is least amenable, of all taxes, to to the rule of uniformity; and in the enactment of excises the greatest freedom of classification has been immemorially exercised both by Congress and by other legislatures. *Knowlton* v. *Moore, supra,* again covers the ground, as follows:

> But the classes of taxes termed duties, imposts and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the sense claimed, is in the nature of things the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned.

> Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord which the construction, if well founded, would create, suggests at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the Constitution in all countries in the levy of such taxes would have to be abandoned in this country, and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would be virtually denied to Congress (pp. 88–89).

And it was said in *Cook* v. *Marshall County,* 196 U. S. 261:

> From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers,

wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned (p. 275).

(2) Uniformity has been found in such Federal xcises as these:

A tax on inheritances, though legacies and dis-ributive shares not over $10,000 were exempted, nd though the rate of the tax varied with the degree f kinship and with the amount of the legacy or stributive share; with the result, as already said, at the rate of tax was sometimes more than twenty mes as high as in other cases (*Knowlton* v. *Moore*, 78 U. S. 41; *Murdock* v. *Ward*, 178 U. S. 139).

A tax on the manufacture of distilled liquors, ough required to be computed on as much as 80 r cent. of the capacity of the distillery, notwith-anding actual manufacture of a smaller amount *Inited States* v. *Singer*, 15 Wall. 111).

A tax on manufactured tobacco, though it had eviously paid one Federal excise (*Patton* v. *Brady*, 4 U. S. 608).

A tax on sales of shares of corporate stock, though was not imposed on sales of other kinds of prop-y (*Thomas* v. *United States*, 192 U. S. 363).

A tax on the manufacture of filled cheese, though the particular instance the filled cheese was ex-rted and though the statute taxing the manufac-

ture of tobacco (Rev. Stat., sec. 3385) expressly relieved exported tobacco and snuff from the manufacturing tax (*Cornell* v. *Coyne*, 192 U. S. 418). In this case it was said:

> Why Congress should grant an exemption from manufacturing tax in the case of exported tobacco and not in the case of exported filled cheese, is not for us to determine. Doubtless the reasons which prompted such difference were satisfactory. It is enough that no exemption has been made in favor of the latter (p. 432).

A tax on sales of "any products or merchandise at any exchange or board of trade or other similar place," though no like tax was put on sales of the same products or merchandise at places not offering the special facilities of an exchange or board of trade (*Nicol* v. *Ames*, 173 U. S. 508). This case is quite indistinguishable from the present.

Without repetition here of the numerous cases relating to Federal excises, cited in the First Point of this brief, it is enough to say that they will generally be found pertinent on the question of uniformity, through what was decided if not through what was said.

(3) *Liverpool Insurance Co.* v. *Massachusetts*, 10 Wall. 566, while not involving a Federal excise, needs repetition in this connection. If a foreign company, whether it be a corporation or a joint stock company, can be subjected by a state (as was there held) to a tax upon its business within the state in an amount

different from the tax put by the state upon domestic companies doing like business in the state, it must be equally true that the business of a corporation or joint stock company can be taxed by Congress though the kindred business of individuals and partnerships is not taxed.

(4) We now come to cases under the Fourteenth Amendment, which this court has declared (as already shown) to afford a measure at least of what Congress may do, because there is no greater restraint upon the taxing discretion of Congress than the Fourteenth Amendment imposes upon the state legislature.

The following are a few of the many cases that could be cited:

Beers v. *Glynn*, 211 U. S. 477; holding valid a tax put by New York on the inheritance of personalty in case the decedent also owned realty in the state, though the tax was not imposed if the decedent had no realty as well as the taxed personalty in the state.

Hatch v. *Reardon*, 204 U. S. 152; upholding a tax by New York on sales of corporate stock, though no like tax was put upon sales of other kinds of personal property or even upon sales of bonds of the same or other corporations. It was there said:

> In the first place, it is said to be an arbitrary discrimination. This objection to a tax must be approached with the greatest caution. The general expressions of the Amendment must not be allowed to upset familiar and long-established methods and processes by a formal elaboration of rules which its words do not import (p. 158).

Armour Packing Company v. *Lacy*, 200 U. S. 226; supporting a state tax on the business of a meat-packing house, though no tax was put on the business of butchers or of those selling the products of the meat-packing house or upon the business of packing other articles of food than meat.

Metropolitan Street Ry. Co. v. *New York*, 199 U. S. 1; sustaining a tax on a surface street railway, though none was imposed upon a sub-surface street railway.

Savannah, etc., Ry. Co. v. *Savannah*, 198 U. S. 392; upholding a tax upon a street railway, though none was imposed on an ordinary steam railway doing "some of the same kind of work" in the same place. (The quoted language is from page 47 of 199 U. S.)

Cook v. *Marshall County*, 196 U. S. 261; sustaining a tax on retail dealers in cigarettes, though none was put on wholesale dealers in cigarettes.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89; upholding a license tax upon persons and corporations doing the business of refining sugar and molasses, though no such tax was put on "planters and farmers grinding and refining their own sugar and molasses."

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283; sustaining an inheritance tax of Illinois, though the rate of tax rose in swift progression with the amount of the legacy and the higher rate was applied to every dollar of the larger legacy.

Pacific Express Co. v. *Seibert*, 142 U. S. 339; sustaining a tax on express companies carrying "on contracts for hire with railroad or steamboat com-

panies" (p. 353), though no tax was put upon express companies carrying by their own means of transportation.

Bell's Gap Railroad Co. v. *Pennsylvania*, 134 U. S. 232; upholding a tax upon moneyed securities *issued by corporations* at the rate of three mills on the dollar of their nominal or par value, though the rate of tax put upon the like moneyed securities issued by others than corporations was three mills on the dollar of their actual value. This was a case, therefore, of peculiar taxation of corporate securities.

The relation of the Fourteenth Amendment to state taxation was described by Mr. Justice Bradley in language often quoted and never disregarded:

> But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not

> tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution (p. 237).

We may add, though it is not a tax case, *Otis* v. *Parker*, 187 U. S. 606, in which the Constitution of California was held valid in its prohibition of "contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day," though the sale of other property on margin or for future delivery was not forbidden.

It will not be denied that Congress may put an excise upon any distinct kind of business and leave all others untaxed (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *McCray* v. *United States*, 195 U. S. 27); and which of the multitudinous kinds of business shall be taxed it is for Congress alone to say. Its selection of the particular business which shall be the subject of a tax is final beyond cavil, if it be a distinct business, though the actual selection do not rest upon any consideration of the relative utility or profitableness of the business which Congress taxes and the other kinds of business which it does not tax, and even though the taxed business is not conducted under exceptional and advantageous rules of law. How much more may Congress select for taxation business which

is done under special and exceptionally advantageous legal and practical conditions, as is true of all business done under the special organization of a corporation or joint stock company, and with the advantage of the many special legal rules which give enlarged and prolonged opportunity to that business!

EIGHTH.

None of the special rules prescribed by the taxing statute concerning exemptions or concerning application or computation of the tax produces any lack of necessary uniformity.

1. It is said that the limitation of the tax to "net income over and above $5,000" creates an unconstitutional exemption. Both reason and authority supply an answer. The $5,000 exemption creates what may be called a "margin of safety." Exemptions from taxation of a limited amount of individual property are well nigh universal; and they rest, doubtless, upon the just and necessary policy of leaving a living opportunity unburdened by government. The same policy supports the $5,000 exemption in this statute. It is especially necessary in the case of a tax measured by net income, because the computation of net income from an extensive and complicated business is always a somewhat uncertain process, both in determination of the factors of profit and expense and in ascertainment (often estimation) of the amount of those factors. Unless some margin of safety against overcalculation of profits is left by the law, it may well often happen that the appearance of profit will be actually erroneous. Beyond

that, it is just and wise to encourage the initiation of new enterprises by giving them special consideration under the law so long as their business remains uncertain and only slightly remunerative. Indeed, the present objection might as well be urged against a tax dependent upon net income at all, instead of being proportioned to gross income. The whole idea of a tax measured by net income is to save a business from public burden unless and until it can surely and safely bear that burden; and such sure and safe ability to pay the tax is guarded in no unreasonable way by allowance of the $5,000 margin in computation of the company's profits.

It is also noticeable and important that every company is given the privilege of the same $5,000 deduction. A company having net income of $10,000 pays only on $5,000, and a company with net income of $100,000 pays only on $95,000. All companies, therefore, are given the benefit of the same corrective factor.

Authority forecloses the matter. In *Spreckels Sugar Refining Company* v. *McClain, supra,* the tax was not imposed by the statute unless the gross annual receipts of the business exceeded $250,000; and yet the statute was held valid. In *Knowlton* v. *Moore, supra,* the inheritance tax was not applied unless the legacy or distributive share had a value of more than $10,000. The quotation already made from *Bell's Gap Railroad Co.* v. *Pennsylvania, supra,* declares the entire legitimacy of reasonable exemptions, and the practice of both Congress and the

state legislatures at all times has accorded them. The act of Congress allowing taxation of shares of national banks like other moneyed capital is held to take no account of reasonable exemptions of such other moneyed capital.

Mercantile Bank v. *New York*, 121 U. S. 138.

2. Complaint has been made that "labor, agricultural or horticultural organizations" are not subjected to the tax. These associations, however, seem hardly to be organized for profit. Pecuniary gain is certainly not their direct or main object. At any rate, if it were necessary, the statute could well be construed as not exempting such associations if their primary purpose is business profit. Such construction, however, is far from necessary. The undisputed power of Congress to select the kinds of business which it will tax covers this exception. It is covered also by this court's holding that the business of refining sugar and molasses may be taxed though no tax is put upon "planters and farmers grinding and refining their own sugar and molasses."

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89.

The decision in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, declaring invalid a statute of Illinois which prohibited combinations and conspiracies in restraint of trade but excepted from its operation combinations and conspiracies concerning "agricultural products and live stock," has no present pertinence. The power of taxation admits differences in

treatment which may sometimes be improper in other fields of legislation. Mr. Justice Harlan, for this court, stated the distinction thus:

> The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the

United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates (pp. 562, 563).

In a later case, *Cook* v. *Marshall County*, 196 U. S. 261, the same comment was made upon the *Connolly* case and also upon *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79—

These cases, however, have but limited application to the laws imposing taxes, where the

> right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism (p. 274).

3. Objection is also made that the tax is not laid upon "fraternal beneficiary societies, orders or associations operating under the lodge system and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders and associations and dependents upon such members". The language of the exception furnishes its own justification. It relates to societies which, as they are "operating under the lodge system" and also are "fraternal", have a social and charitable character. This is farther indicated by the use of the word "benefits" in relation to such payments as are made by the society to its members or dependents in case of death, sickness or accident. Such payments do not constitute an insurance business, even of the mutual kind. The protection which is given to members of the society, in ways resembling insurance, is not the sole or primary object of the society; nor is the procurement of such protection the sole or primary motive of those who enter such a society. The protective benefits are a merely incidental and subordinate feature of the society's work; and, in consequence of the fraternal and charitable character of the society, even such pecuniary benefits are based upon a different principle and determined by other standards and regulated by different rules than even mutual insurance. Examples of such societies, which will be recognized at once as fundamentally social

and charitable, though their charitable operations include something like insurance, are the Knights of Pythias, Knights of Labor, certain Masonic orders, the Red Men of America and the Woodmen of the World. It is almost humorous to urge that such organizations must be considered insurance companies having a purely or chiefly pecuniary function like the New York Life Insurance Company, The Equitable Assurance Society, The Prudential Insurance Company, the New York Mutual Life Insurance Company, the Northwestern Mutual Life Insurance Company, and possibly one or two others which together form the small group of great American mutual insurance companies whose financial power and operations are not surpassed in the entire business world.

Associations of the stated fraternal character are commonly excepted from the general insurance laws of the states.

Marshall v. *Grand Lodge A. O. U. W.*, 66 Pacific Rep. 25, 27.

Fawcett v. *Iron Hall*, 64 Conn. 170, 190.

Westerman v. *Supreme Lodge K. of P.*, 196 Mo. 670; 707, 708; 721, 722.

Such organizations have been held to be exempt from taxation under laws giving exemptions to charitable organizations.

Mayor v. *Solomon's Lodge, etc.*, 53 Ga. 93.

In *City of Petersburg* v. *Petersburg Mechanics Association*, 78 Va. 431, it was held that the Consti-

tution of Virginia, which allowed the legislature to exempt property from taxation if it were used exclusively for benevolent, charitable, educational or religious purposes, did not forbid the exemption from taxation of such associations as are now being considered; and the court said:

> The objects of the association, which was incorporated by the legislature in 1826, are set forth in its constitution and by-laws, and in the preamble thereto, which declares that in instituting a society of mechanics, charity should be the principal but not the only object. Its revenues, as the testimony shows, are wholly applied to the payment of its current expenses, the assistance of its indigent members, and the families of such of them as may have died in needy circumstances. These are charitable purposes, and the relief afforded is none the less charity because confined to members of the association and the families of deceased members. It is not essential to charity that it shall be universal. *City of Indianapolis* v. *The Grand Master, &c.*, 25 Ind., 518 (p. 436).

4. Fault is found also with the exemption of "domestic building and loan associations organized exclusively for the mutual benefit of their members." These associations do not seek gain from the world at large. The exemption extends only to *exclusively* "mutual" associations. Their object, as in the case of "fraternal beneficiary" associations, is to give the benefit of the associate activities to their members as cheaply as possible, rather than to sell their

services to the community at large at as high a price as possible. There are perhaps some building and loan associations which are not exclusively mutual; but, if that be so, the exemption does not reach them. The statute is phrased with exact care to exempt only purely mutual companies.

In *Mercantile National Bank of Cleveland* v. *Hubbard*, 98 Fed. 465, Judge Taft considered the question whether certain exemptions of building and loan association from state taxation constituted a discrimination against national banks within Revised Statutes section 5219. He said:

> It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house. The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose of the building association law (p. 471).

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A similar ruling was made by this court in reference to the exemption of deposits in savings banks, in *National Bank of Wellington* v. *Chapman*, 173 U. S. 205, where it was said:

> The result seems to be that the term "moneyed capital," as used in the Federal statute, does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute (p. 214).

5. The statute also exempts corporations or associations "organized and operated exclusively for religious, charitable or educational purposes, no part of the income of which inures to the benefit of any private stockholder or individual". As yet no fault seems to have been found with this.

6. The measurement of the tax by net income of the corporation or joint stock company "received by it from all sources" during the year is said to destroy the requisite uniformity. The answers are several:

(*a*) It has already been shown that all of the property of a corporation or joint stock company must and does, both in a legal view and in the practical effect which it has upon the business of the corporation or joint stock company, constitute a business

asset. That being so, the measurement of the tax on business by the company's income from all its assets, as well as all its transactions, is essential to real uniformity, or at least highly promotes that uniformity. If one company, by reason of its having larger capital or surplus assets than another, derives a business advantage through its possession of such larger assets, in the ways of larger public confidence in its reliability and stability, greater public patronage and consequent enlargement of the volume of its business, higher credit, with the results of cheaper borrowing and better prices on its necessary materials, and higher profits in consequence of all the foregoing and other influences, then surely such assets form a part of its business plant or equipment and the company's income derived directly or indirectly from such assets is part of its business income, and that income, as much as any other income of the company, may and should be used in measurement of the profitableness and value of the business to those embarked in it.

(*b*) Even if assets of the company be not directly or immediately applied at all times in the general activities of the business, those assets afford opportunity or capacity for business. As already said, they are held for the needs and purposes of the business; and can not be held for any other use. Considering the assets of the company therefore merely as creating an opportunity or measuring a capacity of the company in business, the amount of tax on the business may be properly made to depend

on the existence and extent of such opportunity and capacity. This was directly involved in *United States* v. *Singer*, 15 Wall. 111.

As will be recalled, a Federal excise upon the liquor business was there held to be properly fixed by the statute at a minimum amount corresponding with 80 per cent. of the total capacity of the plant, though the actual output of the plant was less. It is worth noticing, too, that this court found in the statute involved in the *Singer* case a purpose of counteracting fraudulent methods or returns, saying—

> The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the government tax. And it seems well suited to accomplish this purpose; it at least reduces the limits within which fraud can be practiced to twenty per cent. of the capacity of the distillery. In view of the enormous frauds previously practiced upon the government in rendering accounts, this system can not be justly charged with unnecessary harshness. Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distil at all, he is not entitled to much consideration (p. 120).

A similar purpose may be ascribed to the present taxing act, for there will be much room for mistaken if not fraudulent separation of the company's income

into business income and property income if such a distinction is recognized. It may be said, also, of the present statute, as this court said of the liquor excise, that companies which continue to hold substantial amounts of property without either giving them activity in the business or distributing them to the business proprietors are "not entitled to much consideration."

Furthermore, what but the capacity of the business measured the excise tax involved, for example, in *Society for Savings* v. *Coite*, 6 Wall. 594, and *Provident Institution* v. *Massachusetts*, 6 Wall. 611? That excise was measured by the amount of the bank's deposits whether those deposits were made active in the bank's business or not. The tax, therefore, was proportioned, not to all, but to a part of the company's usable assets, because they enlarged the character and capacity of the bank. The same is true, and equally plain, of the excise involved in *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632; which, it will be remembered, was measured by the excess of the corporation's capital stock above the value of its real estate and machinery. The value thus measuring the tax on the business created and represented the corporate capacity for business; and no difference was made in the tax in consequence of a possibility that part of the capital, though available and retained for business uses, might at a particular time chance not to be actively employed.

Nor will it do to say that the excises involved in these cases in 6 Wallace were imposed by the state

which chartered the company and therefore could be put at any amount or measured by any test, however unreasonable; for the constitution of Massachusetts provided at the time that excises must be reasonable. It will be found quoted in *President, Directors and Company of Portland Bank* v. *Apthorp*, 12 Mass. 252 on p. 254. See also *Connecticut Mutual Life Insurance Co.* v. *Commonwealth*, 133 Mass. 161, where it was held that a franchise tax in Massachusetts could not be sustained as a property tax, but must be treated as an excise, because of its not conforming to the constitutional requirements concerning property taxes.

(*c*) The business tax upon corporations involved in *Home Insurance Co.* v. *New York State*, 134 U. S. 594, was measured by the entire capital stock of the company; without any reference to the question whether that capital was passive or active in the business at a particular time.

(*d*) While such result is believed to be altogether unnecessary and though it would go far to complicate and also to impair this statute, yet it is entirely possible to construe the words "net income received from all sources" as relating only to income derived from property actively employed in the current operations of the business. That construction can be gathered not only from the rule that Congress must be taken to have intended what is constitutional, but also from the express statement of the statute that the tax is laid on companies "organized

for profit" and is laid specifically "with respect to the carrying on or doing business."

7. Another objection is that in computing net income no deduction of interest payments can be made, except in case of interest paid by banks and trust companies on deposits, beyond such interest as is "actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock" of the corporation or joint stock company. But the reason for this limitation on the interest deduction is obvious and strong. Without the limitation, corporations and joint stock companies by issuing bonds for all or most of their capital—either with or without an accompanying issue of stock—could distribute the business profits, however large, in the form of interest payments; and the tax in that way could be entirely or largely avoided. Therefore, no more interest is allowed to be deducted than is paid upon the amount of indebtedness limited by the paid-up capital stock. It was necessary that the stock which fixes the amount of indebtedness whose interest is deductible be required by the statute to be paid-up, because otherwise stock could and would be issued for the mere purpose of enlarging the amount of indebtedness measuring the privilege of interest deduction. As the statute stands, it avoids the inducement to the issue of watered stock which would arise if interest could be deducted when paid upon indebtedness equal in amount to actual stock,

though not paid-up; and it also prevents defeat of the tax through unrestricted creation of debt.

The limit put upon interest deductions is therefore of fundamental practical importance. Without it the entire efficiency of the statute could easily be destroyed. Plans and methods of taxation have to be based upon, and framed in obedience to, practical considerations which will assure the effective operation of the taxing law. So this court has frequently stated. In *District of Columbia* v. *Brooke*, 214 U. S. 138, this was said concerning taxation:

> A wide range of discretion, therefore, is necessary in legislation *to make it practical*, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. . . . We said in *St. John* v. *New York*, 201 U. S. at pages 633, 637, not only the purpose of a law must be considered, but *the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose* (p. 150).

In *Hatch* v. *Reardon*, 204 U. S. 152, it was said of another tax:

> The inequality of the tax, so far as actual values are concerned, is manifest. But, here again equality in this sense has to yield to practical considerations and usage (p. 159).

In *Railroad Co.* v. *Collector*, 100 U. S. 595, it was said:

> How are these "earnings, profits, incomes, or gains" to be most certainly ascertained?

> In every well-conducted corporation of this character these profits were disposed of in one of the four methods; namely, distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a a reserve or other fund remaining in its hands. Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, *and as less liable to evasion than any other*, the tax is imposed upon all of them (p. 598).

Finally, it is not to be forgotten that no real injustice is involved in the limitation of the interest deduction, because Congress might have measured the excise by gross income. *A fortiori*, for the purpose of measuring the amount of an excise on business, Congress may prescribe general rules as to what shall be deemed net income.

8. The allowance to banks and trust companies of the privilege of deducting all their payments of interest on deposits is for the plain reason that such interest represents a current expense of the business of the bank or trust company, whose very occupation is borrowing and lending money. The deposits are not, in a true sense, either capital or surplus of the bank. The depositors are a different class from the proprietors of the business. The evasions of the law against which the general clause concerning deduction of interest is designed to guard are not threatened in connection with bank deposits.

9. Perhaps complaint will be made that a company which owns stock of another company whose business is itself taxed is allowed to exclude from the computation of its own net income such dividends as it receives upon that stock. This privilege, however, is extended to all companies alike, if they are in the situation to which the privilege attaches; and the deduction is allowed because of equitable considerations which Congress had a right to recognize. There is much similarity between this provision and a deduction considered in *Metropolitan Street Railway Co.* v. *New York*, 199 U. S. 1. The statute of New York imposing a franchise tax provided "for the deduction of *annual* payments covered by existing contracts from the amount of tax levied, by reason of which deduction those who agreed to pay for their franchises *lump sums or annual amounts less than the new tax*" were asserted to suffer discrimination (p. 46). This court said of that claim:

> With respect to the second [i. e., the stated claim], it may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land, part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the government. Further, this whole matter of allow-

> ing a reduction on account of that which is spoken of as "in the nature of a tax" is a matter of grace on the part of the legislature. The franchises granted were, as we have held, subject to taxation, and the fact that upon equitable considerations the state has consented that a certain reduction shall, in some cases be made, does not entitle every holder of a franchise to a like reduction. It is akin to an exemption, and there is nothing in the Federal Constitution to prevent a state from granting exemptions from taxation (pp. 46–47).

Reference may also be made again to *Hatch* v. *Reardon, supra*, where the tax on transfer of shares of stock was measured by the nominal or par value of the shares. Of the two stock-sale transactions considered in that case this court said that, "one of the stocks was worth thirty dollars and seventy-five cents a share of the face value of one hundred dollars, the other one hundred and seventy-two dollars" (p. 159). Nevertheless, the fact that the general rule fixed by the statute, and available to all in like situation, wrought an actual inequality in its application to different transactions was held to be unimportant.

10. Another claim of appellants is that this tax on the business of corporations and joint stock companies will operate with necessary inequality because the special privileges and advantages which those companies have under the laws of the several states are different, and therefore the amount of the tax ought to vary with the extent of the privileges and

advantages. This argument would lead to the conclusion that a different Federal excise ought to be imposed in different states, and also to the conclusion that the Federal excise ought to alter with the shifts of state legislation from time to time. Such an idea is utterly impractical. Beyond that, it has no basis in theory. Congress or any other legislature may put the same tax on different kinds of business, even though it may not put different taxes on the same kind of business. If Congress may select a single kind of business as a subject of taxation, it may equally make several kinds of business the subject of a tax. What would be valid if *any* one of the several kinds of business selected for taxation were taxed does not become invalid because they are all taxed.

Like argument was made in *Knowlton* v. *Moore*, so often cited and quoted, and was answered thus:

> It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may

obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States (178 U. S., on pages 107–108.)

NINTH.

The company required to pay the tax is not subjected to any unreasonable search or seizure, or improperly required to incriminate itself, by any of the administrative provisions of the statute.

I.

It is claimed that the provision requiring the tax returns to be kept as public records and open to inspection as such is unreasonable, because it enables competitors of the tax-paying companies who are not required to make returns to obtain information concerning the tax-paying companies' business and therefore amounts to an unreasonable search or seizure. As to this—

1. The right to require the returns themselves is not and can not be disputed. It is a necessary incident of the right to impose the tax. Consequently the objection is and must be confined entirely to the publicity feature.

2. Even if the requirement of publicity were obnoxious to the Constitution, that would be no reason for holding the tax invalid or for enjoining the companies from making the returns. Full relief could be had by preventing the returns from being made public. The validity of the publicity feature is not properly an issue in these cases.

3. The publicity feature, however, is *not unreasonable*, because—

(*a*) Congress has the right to adopt such measures as it deems essential to insure true returns. The tendency to avoid taxes by making false returns is indisputable, and it cannot be better met than by subjecting the returns to the sharp scrutiny of well-informed competitors who are interested in seeing that the reporting companies pay their full taxes. The principle underlying the provision is identical with that which has prompted many states to make general publication of personal property returns. Some of them (Illinois, for example) even go so far as to distribute to all tax-payers in each precinct lists showing the amounts returned by each person for taxation. Nor is it true, as claimed in one of the briefs, that this cannot be the purpose of the provision, merely because publicity is not given to the returns until after assessment has been made; for the assessment may be corrected at any time under Paragraph Fourth of the law and it would be idle to publish the returns until the Commissioner of Internal Revenue had done what he could to verify them

Besides, in this respect the provision is consistent with the general practice in other cases.

(*b*) The returns will not disclose materially different facts than are published already by most corporations in their annual reports. It may be that some corporations do not give out their annual reports to the public generally, but the rule is otherwise; and, in any event, it can hardly be deemed so unreasonable as to violate the Constitution that what most companies already do is expected of all.

(*c*) Like reports have for years been required from various kinds of business enterprises by the states under their police powers and by the Government under its power to regulate commerce. Witness the provisions for reports from banks, insurance companies, railroads, pawn-brokers, and others. Such reports are always made at least public records and are frequently published in the newspapers or otherwise. Why should that which is proper when done pursuant to the police power or the power to regulate commerce become improper when done under the taxing power? The necessity for it is no greater in the one case than in the other.

4. Finally, *neither the making nor the publication of the returns can in any possible view be a search or seizure*, reasonable or unreasonable. Search and seizure are both *physical* intrusions, upon the person or his house, papers or effects. It was said in *Hale* v. *Henkel*, 201 U. S. 43, on page 76, that "a search ordinarily implies a quest by an officer of the law,

and a seizure contemplates a forcible dispossession of the owner." An exception to this rule is sometimes supposed to have been recognized in *Boyd* v. *United States*, 116 U. S. 616, but the exception is not real. In that case a compulsory production of books or papers, for the direct and sole purpose of incriminating the person producing them, was held to be an unreasonable search and seizure; but this production of books and papers for which the unconstitutional enactment called was itself a physical act and involved a physical invasion. The *place of search* was the court room, but otherwise it was precisely the same as if the person had been seized on the street or in his house and his papers had there been taken from him and examined. Neither the search nor the seizure was the less real because it was enforced by court process. But a return for taxation is merely an enforced statement of the reporting person's *knowledge* and involves no physical invasion of his person, house, papers or effects. He suffers no inconvenience. His house is not entered. His books and papers all remain in his possession and no penalty is attached as in the *Boyd* case for his failure to produce them. Their production is not even commanded or desired. Every element of a search or seizure is therefore lacking. And since the return itself is not obtained by search or seizure it follows necessarily that giving publicity to it cannot amount to a search or seizure.

II.

It is also claimed that the provision authorizing the Commissioner of Internal Revenue under prescribed circumstances to make inspection of the books and papers of companies subject to the tax, for the purpose of correcting any return already made or of making a return where none has been made, violates the Constitutional guaranty against unreasonable searches and seizures. As to such claim—

1. It is not properly an issue in any case now before the court; for in none of those cases does it appear that the Commissioner of Internal Revenue will have occasion to avail himself of his right to to make the inspection—which is only authorized when *evidence* is produced which satisfies the Commissioner that a particular return is incorrect, or when a collector reports that some corporation, joint stock company or association or insurance company *has failed to make any return* at all. The rule is elementary that courts will not consider a possible constitutional objection to a law until absolute necessity for such consideration arises.

2. But the right to make the stated inspection is undoubted. It is a necessary incident of the right to impose the tax, for without the power to ascertain the income of the taxed company the right to tax is valueless. On this principle the Government's right to search for goods concealed in fraud of the revenue laws and to supervise the manufacture or

custody of excisable articles has never been doubted (*Boyd* v. *United States, supra*). Without the right to ascertain income for itself, by all appropriate means, how is the tax to be collected if some company refuses to make any return?

3. Nor does the right of inspection fail because the result of its exercise may be to show the falsity of some return and consequent liability to the punishment imposed for making false returns. The *Boyd* case, *supra*, is supposed to, but does not, announce a contrary doctrine. It only held (1) that a search can not lawfully be made *for the sole purpose of obtaining incriminating evidence* and (2) that an order requiring production of books and papers *for a like purpose* amounted to a search. It did not hold that a search justified on other grounds became unreasonable or unlawful because it might result in incriminating the person against whom it was directed. On the contrary, an intent to establish such a rule was in terms negatived and the decision was based entirely on the ground that the sole purpose of the search was to obtain incriminating evidence; the right to make it not being claimed on any other ground. And, accordingly, neither before nor since the *Boyd* judgment has the right to search for stolen goods, or counterfeit coins, or gaming implements, or lottery tickets, or concealed dutiable goods ever been doubted, though in each case the result of the search might be incrimination of the person against whom it was directed.

4. Nor can the fact that the inspection of the books and papers may inform the government officers about

private or confidential business facts which the tax paying company does not desire to reveal affect its legality or reasonableness. It often occurs that in the prosecution of a lawful inquiry or search information of the most private character or even evidence sufficient to show criminal liability is obtained; but the search or inquiry is not unreasonable because it may have such consequence. Thus in the case of *In re Chapman*, 166 U. S. 661, this court held that the guaranty against unreasonable searches and seizures did not protect a witness from disclosure of business transactions between himself and certain Senators in the course of an investigation by a committee of the Senate, lawfully prosecuted and such in scope that the information called for was germane to its purpose. And in *Adams* v. *New York*, 192 U. S. 585, it was held that certain papers obtained in the course of a search for lottery tickets could be used in evidence against the person searched although such papers were not of a kind for which a search was authorized. The true rule is that the search must be warranted by some right, private or public, such as the right of the owner to recover stolen goods or the right of the Government to seize contraband articles or to assess taxes; but, when so authorized, the search may be conducted to the farthest necessary limit without regard to indirect consequences.

5. The case of *Hale* v. *Henkel*, (201, U. S. 43, 76–77) does not affect the question. Although it was there held that a *subpœna duces tecum* violated the rule against unreasonable searches and seizures, the de-

cision was based wholly on the ground that the books and papers called for were so numerous that response to the *subpœna* would paralyze the subpœnaed company's business pending the inquiry. Such objection cannot be made to mere inspection of books and papers remaining in the undisturbed possession of their owner, without substantial interference with their continuous use. Indeed in *Hale* v. *Henkel* the court expressly disclaimed any intention to establish a rule which would interfere with such an inspection of books and papers made pursuant to proper authority. (See p. 77).

6. Lastly, it cannot be contended that the inspection amounts to an unreasonable search because proper safeguards against abuse of the right to make it are omitted. On the contrary the right to make the inspection is limited to two contingencies: (1) "Whenever *evidence shall be produced before the Commissioner of Internal Revenue* which in the opinion of the Commissioner *justifies the belief* that the return made by any corporation, joint stock company or association, or insurance company, *is incorrect,*" and (2) "Whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, *has failed to make a return* as required by law." Thus wanton, whimsical, or unwarranted searches are guarded against by requiring initial proceedings, substantially like those required for obtaining search warrants.

III.

Finally, it is claimed that the authority vested in the Commissioner of Internal Revenue to examine officers and employes of the tax-paying companies as witnesses and to compel production of books and papers violates the constitutional guarantee of immunity from self-incrimination. The answers to this assertion are:

1. Like the claims discussed in subdivisions I and II, it is not in this case and should not be considered. This present litigation relates only to the obligation of any company *to pay* the tax and *itself to make a return.*

2. The right to examine witnesses and to compel production of books and papers for the purpose of verifying tax returns is unquestionable. Argument in support of that proposition is unnecessary. The only question is whether the statute compels a witness to give testimony or produce books or papers which will incriminate him.

3. Such is not the case. By no possible construction can the statute be so distorted. Like any other statute giving the right to take testimony in general terms it is subject to the qualification that the testimony may properly be obtained from the witness. It is altogether unlike the statute considered in the *Boyd* case, *supra*. That statute did in fact attempt to compel self-incrimination; for, after authorizing orders requiring production of books and papers, it provided that in case of a refusal or failure to do so

the facts which were sought to be proved by the books or papers *should be taken as confessed*, and the whole proceeding related to cases wherein the Government was attempting to enforce penalties for violations of the revenue laws.

4. Accordingly there can be no objection to the *law itself* on the present ground; but such objection can only go to particular attempts to obtain evidence under the law. Not only so but the objection can only arise when the witness claims the privilege against self-incrimination for his own benefit. The privilege is a personal one, and cannot be claimed even by an agent in behalf of his principal or by an officer in behalf of a corporation. (*Hale* v. *Henkel*, *supra*, pp. 69–70, 74, *et seq.*). If in any case an improper attempt be made to compel a witness to incriminate himself, the courts will be at hand to protect him.

TENTH.

The tax may properly be collected in 1910, though it is measured by the net income of the tax-paying company during the calendar year 1909, of which seven months had already passed when, on August 5, 1909, the taxing statute was enacted.

Three considerations show this:

1. The tax is not laid upon, but is only measured by, income. However measured, it remains a tax for the year 1910 in which it is payable. Suppose it had been measured by the undivided profits on hand on January 1, 1910, would anyone contend that it was retroactive because those profits might be the accumulations of years? Indeed, this court has itself sug-

gested that income for one year might properly be adopted as the measure for *all* future years. (*Maine* v. *Grand Trunk Ry.*, 142 U. S. 217, 229.)

2. Even an excise laid in terms on income may be levied after part of the year during which the taxed income is received has expired. In *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331, this court had before it the question whether or not an act passed July 14, 1870, and providing that a prior act laying a tax on incomes *until* 1870 should be "*construed*" as imposing a tax until August 1, 1870, could be treated as itself imposing the tax for the period from January 1 to August 1, 1870. In holding that it could be so treated, the court said:

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

Although the judgment in this case was by a divided court (four judges placing their decision on the stated ground alone, two judges concurring in the *opinion* on that ground though thinking there was "a still more satisfactory ground," and three judges dissenting), yet the dissent did not reach the proposition established by the quoted language—which was but a preliminary step, though a necessary one, in reaching the conclusion that Congress *intended* to im-

pose a new tax by the act of 1870—for on page 341, in the dissenting opinion, it was said:

> Of course, I am not to be understood as maintaining that when the declaratory act was passed, Congress had no power to impose a tax upon any income that had been received before that time.

And the doctrine of the *Stockdale* case, *supra*, both on the point under consideration when the quoted language was used and on the point treated in the concurring opinion, was explicitly confirmed after full consideration in the case of *Railroad Co.* v. *Rose*, 95 U. S. 78, 80. The authority of the *Stockdale* case is therefore decisive. Beyond that, it was pointed out by way of argument in support of the conclusion in the *Stockdale* case that "the joint resolution of July 4, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it;" and, although this language was used merely by way of argument, its soundness has since been sustained in the case of *Patton* v. *Brady*, 184 U. S. 608. In that case, the validity of the provisions of the war revenue act of 1898, which required the payment of new taxes *in addition to those which had already been paid* on all tobacco held for sale, was attacked on the ground that, one excise having already been paid upon the tobacco there involved, another could not constitutionally be imposed upon it. But the court, in an elaborate opinion, unanimously held otherwise.

3. Finally, "unless the Constitution prohibits retrospective legislation, the basis of an assessment of taxes may as lawfully be retrospective as the reverse; that is to say, it may as well have regard to benefits theretofore received as to those which may be assessed thereafter" (Cooley on Taxation, 3d ed., p. 492); and the Federal Constitution does not prohibit retrospective taxation.

Locke v. *New Orleans*, 4 Wall. 172.

ELEVENTH.

If in any part or application this taxing statute is unconstitutional, it should be sustained nevertheless in all its other parts and applications.

Extended discussion of this proposition is unnecessary. The general rule on which it is founded is well stated in Cooley's Constitutional Limitations (7th ed.), as follows:

> It will sometimes be found that an act of the legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. * * * Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, dependent on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it can not be presumed the legislature would have passed the one without the other (pp. 246–7).

* * * * *

> A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. * * * In any such case the unconstitutional law must operate as far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others (p. 250).

Instances of the application of the first branch of the rule are found in *Field* v. *Clark*, 143 U. S. 649, and *Huntington* v. *Worthen*, 120 U. S. 97; and of the second branch of the rule in the first *Income Tax* case, 157 U. S. 429, and *New York Central R. R. Co* v. *United States*, 212 U. S. 481, 497. The principle applies with special and peculiar force to tax legislation. In *Field* v. *Clark* it was said (p. 696):

> Unless it be *impossible to avoid it*, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.

In *Huntington* v. *Worthen* it was held that even the invalidity of an exemption did not void the entire act, although the enforcement of the act without giving effect to the exemption resulted in the imposition of the tax on the exempted property, contrary to the declared intention of Congress; and in the second *Income Tax* case, 158 U. S. 601, although the entire act was declared invalid, it was only because the tax attempted to be levied by the unconstitutional part of the law constituted "by far the largest part of the anticipated revenue" under the act; so that, if the remainder of the law had been allowed to stand, "what was intended as a tax on capital would remain in substance a tax on occupations and labor" (pp. 636–7).

In the present case the various objections to particular parts or applications of the law are all embraced in one or another of three classes, viz: (1) Objections to the inclusion of certain species of income in the computation of the net income for the purpose of measuring the amount of the tax. (2) Objections to the application of the law to particular kinds of enterprises. (3) Objections to administrative features of the law.

It is clear that, even if some or all of these objections can be sustained, it does not follow and cannot be supposed that Congress would not have passed the law so far as it is unobjectionable, because—treating the several classes of objections in their order—

1. Only a comparatively small part of the income of companies engaged in business for profit is of a

kind to which the objections reach. To use the language of this court in the *Income Tax* case, "by far the largest part" of the income by which the amount of the tax will be measured is derived from commercial activities, as distinguished from income-producing property held or used in connection with the business, and consequently is not within any of the objections. In all or nearly all kinds of business carried on for profit the important revenue-producing factor is exchange. The merchant exchanges goods; the broker, services; the insurance company, insurance; the carrier, transportation; and the income received through such exchanges is not of a kind reached by the objections. Not only so, but if there be companies whose income is largely or mainly of a kind objected to, their income will form but a small part of the total sum by which the aggregate amount of the Government's revenue under the law will be determined, and it cannot reasonably be supposed that, had Congress known its inability to include such income in measuring the amount of the tax, such knowledge would have deterred it from raising the immensely more important part of the desired revenue by the means adopted. In the first *Income Tax* case the reduction in the total revenue through the invalidity of the tax with respect to income from real estate and state securities was vastly greater than could be the reduction in the present case if all the income objected to were eliminated in computing the tax, and yet this court was unable to conclude that the entire law was invalid for that reason. *A fortiori*

should such conclusion be avoided here. Further than that, the exclusion of all the income objected to in this case could not possibly have the result which compelled the court to declare the entire law void in the second *Income Tax* case—namely, a change in the character of the tax; for the tax in the present case was not intended to be, and is not in fact, a tax on capital, but is solely a tax upon the conduct of business, *and will remain so, whether measured by all or only by some of the kinds of income received by the companies taxed.*

2. From what has already been said, it is equally clear that the unconstitutionality of the tax as to some particular kind of enterprise can not affect its validity as a whole. Not only would the effect of such unconstitutionality upon the total revenue be insignificant, but so also would be its effect in reducing the number of different kinds of business taxed. The law reaches all kinds, and therefore each kind, of business carried on by any corporation or joint stock company, as well as the insurance business. The variety of businesses taxed is therefore unbounded, while the number of different kinds of enterprise which claim immunity from the tax by reason of their character is relatively small. In such circumstances the separableness of the portion of the act applicable to non-taxable enterprises (if there be any such portion) is obvious.

3. The validity of the tax itself can not in any possible view be affected by unconstitutionality of any of the administrative features of the law which

are attacked. All of the objections to such features could be sustained and still sufficient machinery would remain for the collection of the tax, though evasions of it might be made easier.

CONCLUSION.

The decrees of the several Circuit Courts, from which appeals have been taken, should be affirmed in all the cases.

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MARCH, 1910.

SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or asso-

ciations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other

indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided*, That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the mainterance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allow-

ance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year end-

ing December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint

stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any,

required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in

the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue

under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon informa-

tion obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the

time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

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In the Supreme Court of the United States.

OCTOBER TERM, 1909.

STELLA P. FLINT, AS GENERAL GUARDIAN of the property of Samuel N. Stone, jr., a minor, appellant, *v.* STONE TRACY COMPANY ET AL.	No. 747.
Also fourteen other cases advanced for hearing with the preceding case.	Nos. 751, 752, 753, 754, 757, 767, 775, 784, 785, 796, 797, 800, 816, and 819.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

While the point was not urged by any appellant in the oral argument of these cases, it is suggested in some of the bills that the corporation tax amendment, being section 38 of chapter 6 of the acts of the Sixty-first Congress, first session, is unconstitutional because it is a revenue measure and originated in the Senate, in violation of the following provision of section 7 of Article I of the Constitution:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate

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may propose or concur with amendments as on other bills.

This supplemental brief will merely enumerate the grounds on which this contention is met.

ARGUMENT.

The Constitution allows the Senate to "propose or concur with amendments as on other bills;" and this section 38 was a permissible amendment.

The bill introduced in the House and into which section 38 was put was a general bill for the collection of revenue. It dealt chiefly with tariff duties, but not exclusively. Various internal-revenue taxes were proposed in it; and the preponderance of the tariff provisions was solely because of the prominence which such taxes have heretofore had in the fiscal plans of the United States. The amendment adding a corporation tax was germane to such a bill proposing various sources of governmental revenue. What the tariff taxes themselves should be would necessarily depend upon the nature and productiveness of the complementary taxes imposed by the measure. Taxation ought to be, even if sometimes it is not, imposed through a consistent plan which disposes its burden in different ways and on different things. It is therefore proper to introduce into a revenue bill—none the less because it is chiefly a tariff bill—any form of tax which, besides supplementing the tariff duties, will naturally alter the tariff plan itself either in the direction or in the amount of the various duties.

The bill as originally introduced in the House (H. R. 1438; secs. 34–38, 61st Cong., 1st sess., Doc. No. 92, pp. 341–350) contained a plan of inheritance taxation. The corporation tax was in part a substitute for that inheritance tax, which was removed in the Senate. When the Senate took out the inheritance tax, the consequent loss of revenue had to be met in some way, and the corporation tax was one of the ways of meeting it. This exhibits concretely the organic relation between the corporation tax and all other parts of the total revenue plan. Each part of a taxing scheme unavoidably has real relation to all its other parts.

The amendment of this revenue bill by substitution of the corporation tax for other forms of tax in the Senate was in accord with a custom which has prevailed from the very establishment of the Federal Government. Immediately upon the adoption of the Constitution the Senate began to exercise its power of freely amending revenue bills (Annals of Congress, 1st session of 1st Congress, 1789, p. 46). The early records show that the Senate at once assumed the right to strike out or to add sections in revenue bills (Annals of Congress, 1st session of 3d Congress, 1793–1795, p. 119); and that the exercise of this power sometimes resulted in conference and compromise, of which Bryce speaks in his "American Commonwealth," volume 1, pages 99–100 (Annals of Congress, 3d session of 1st Congress, 1790–1791, pp. 1764, 1771; Annals of Congress, 1st session of 3d Congress, 1793–1795, pp. 104, 105, 119,

683, 697, 700); while at other times the House has accepted the Senate's amendments without controversy (Annals of Congress, 1st session of 1st Congress, 1789, p. 79).

II.

In a true view of the legislative growth of the general revenue measure forming chapter 6 of the enactments of the first session of the Sixty-first Congress, section 38 did not originate in the Senate.

The general history of the matter is as follows:

(*a*) H. R. 1438 was passed by the House without a corporation tax and with an inheritance tax and other provisions which disappeared in the Senate.

(*b*) A form of the corporation tax, importantly different from that finally enacted, was introduced as an amendment in the Senate; and the Senate passed the bill with that and other amendments.

(*c*) The House refused to concur in the Senate amendments to its bill; and that refusal embraced the corporation tax amendment.

(*d*) A conference committee was appointed by each House of Congress, and the conferees finally agreed upon the present form of the corporation tax. The important differences between such tax as approved by the conferees of the Senate and House and the form of the tax originally offered in the Senate will appear from House Document No. 92 of the Sixty-first Congress, first session, pages 402–413 and pages 457–461. The latter pages show the form of the corporation tax section both as finally passed by both Houses and as proposed by the conferees.

(*e*) Section 38 in the new and different form given to it by the conferees was reported to each House by its conferees.

(*f*) The House passed the section as submitted by its conferees.

(*g*) After its passage by the House the present section 38 was passed by the Senate.

It results that, as the present section 38 is vitally different from the section originally proposed in the Senate and as the present form of the section originated with the conferees of the House as well as of the Senate, this corporation tax law did originate in the House. It can properly be said to have originated with its submission to the House by the representatives of that body in the conference. Further, the present form of the section passed the House before it was voted on in the Senate; and it may well be said that a bill originates in that House which first passes it.

III.

Chapter 6 of the acts of the first session of the Sixty-first Congress, containing section 38, is now in the official custody of the Secretary of State; and it bears the usual certificate of the Clerk of the House of Representatives *that the measure originated in that House;* and it is signed by the President of the Senate and Speaker of the House in the usual way; and it bears the signature of the President in approval of the act.

These facts and certificates are indisputable as to the regularity of the bill's introduction and passage.

Field v. *Clark*, 143 U. S. 649.
Harwood v. *Wentworth*, 162 U. S. 547.
Twin City Bank v. *Nebeker*, 167 U. S. 196.
Millard v. *Roberts*, 202 U. S. 429, 438.

These cases do not decide the question, but they put it with repeated force. Thus, in *Field* v. *Clark*, it was said:

> The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two Houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective Houses are kept by the subordinate officers charged with the duty of keeping them (p. 673).

In *Harwood* v. *Wentworth* it was directly held that an act of the legislature of the Territory of Arizona, officially attested and approved and committed to the custody of the secretary of the Territory, could not be impeached by the use of recitals or through the omission of recitals in the legislative journals which were not required by the fundamental law of the Territory to be so kept as to show everything done in the legislature while engaged in consideration of the bill resulting in the enactment.

IV.

Only the House of Representatives itself can protect its right to have revenue bills originate there. This particular provision of the Constitution can not be deemed self-executing, with the result of making a revenue enactment void though it has had the actual assent of both Houses of Congress. When the House of Representatives in fact has agreed to the measure, all objection because of the place of its origination should be deemed waived by the body which has the right to insist on it.

V.

At any rate, if anybody else than the House of Representatives can insist upon the constitutional provision, that important power is not left to any private individual who may take it upon himself to make the attack. The protection given by the Constitution, through its requirement that the more popular branch of Congress shall originate taxing measures, belongs to the public as a whole and not to particular citizens. It is therefore to be enforced by the proper official representatives of the public. No private citizen has any special or peculiar interest in the matter; for no private citizen is injured by disregard of the constitutional rule in any way that is special or peculiar to him. This is a quite normal application of the familar general doctrine that individuals can not enforce public rights when their violation causes no private injury of a special kind.

It can not be supposed that the Constitution was designed to put into the hands of any and every individual citizen a privilege of private attack upon legislation which has received the actual and full assent of both Houses of Congress.

LLOYD W. BOWERS,
Solicitor-General.

MARCH, 1910.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 707[illegible]

WYCKOFF VAN DERHOEF, APPELLANT,

vs.

THE CONEY ISLAND AND BRIGHTON BEACH RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED [illegible], 1916.

(16,[illegible])

(21,977.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 751.

WYCKOFF VAN DERHOEF, APPELLANT,

vs.

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1910.

1 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

WYCKOFF VAN DERHOEF, Complainant,
against
THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh, and Duncan B. Cannon, Directors of said Company, Defendants.

To the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, Sitting in Equity:

Your orator, Wyckoff Van Derhoef, a citizen of the State of New York and a resident of the Borough of Brooklyn in the City of New York in said State, brings this his bill of complaint in behalf of himself and all other stockholders of the defendant The Coney Island and Brooklyn Railroad Company who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit against said The Coney Island and Brooklyn Railroad Company and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, as Directors thereof; and thereupon your orator complains and shows:

2 First. That the defendant The Coney Island and Brooklyn Railroad Company is a corporation duly organized in the year 1860 under and by virtue of the provisions of an act of the Legislature of the State of New York entitled "An Act to Authorize the Formation of Railroad Corporations and to Regulate the Same," passed April 2, 1850, and the acts amendatory thereof or supplementary thereto. Said defendant company was organized for the purpose, as stated in its charter, of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property from a point in and upon Coney Island in the Town of Gravesend, County of Kings, State of New York, to a point in the City of Brooklyn at or near the Fulton Ferry in said County and State. On April 20, 1861, the Legislature of the State of New York enacted "An Act to Authorize the Coney Island and Brooklyn Railroad Company to Construct their Road and to Lay Thereon Rails of Less Weight than Required by the General Railroad Act and to Widen and Reconstruct the Bridge at Coney Island," being Chapter

324 of the Laws of that Year, and thereby the said Legislature located the Railroad of the said defendant from the Fulton Ferry in the City of Brooklyn to a point in and upon Coney Island in the County of Kings, through and over various public streets, roads and avenues in said Act referred to. In 1861 and 1862 the said railroad of the defendant Company was constructed and it ever since has been operated by said defendant. On April 30, 1866, the Legislature of the State of New York enacted "An Act to Extend the Boundaries of Prospect Park in the City of Brooklyn," being Chapter 853 of the Laws of that year, and thereby extended Prospect Park
3 and closed Eleventh Avenue, on which the defendant company's railroad was located, and authorized said defendant company to construct and operate its railroad on Ninth Avenue from Ninth Street to Fifteenth Street. On May 7, 1868, the Legislature of the State of New York enacted "An Act for the Relief of The Coney Island and Brooklyn Railroad Company," being Chapter 675 of the Laws of that year, and thereby authorized the defendant to lay its tracks upon Fifteenth Street from Ninth Avenue to the intersection of Fifteenth Street with the Coney Island road, and to operate its road and run its cars over the same. On April 25, 1872, the Legislature of the State of New York enacted "An Act for the Relief of The Coney Island and Brooklyn Railroad Company," being Chapter 365 of the Laws of that year, and thereby authorized said defendant company to construct and operate its railroad upon Church Street (now Ninth Street) from Smith Street to Hamilton Avenue and thence along Hamilton Avenue to Hamilton Ferry. Said defendant company has also succeeded by purchase, merger or lease to all the rights, privileges, franchises and property formerly belonging to the Prospect Park and Flatbush Railroad Company, incorporated in January 1876 under the General Railroad Act of 1850 of the State of New York, and the Brooklyn City and Newtown Railroad Company, a corporation organized under the same Act. The railroads now owned and operated by said company defendant are as follows: a railroad from the Fulton Ferry, Brooklyn, and from Park Row, Manhattan, to Coney Island, and a branch from the Hamilton Ferry, Brooklyn, connecting with the aforesaid line at Smith Street and Ninth Street; the De Kalb Avenue line, so-called, extending from the Fulton Ferry, Brooklyn, and Park
4 Row, Manhattan, to the corner of Covert and Metropolitan Avenues, in the Borough of Queens, City of New York, and the Franklin Avenue line extending from the Grand Street and Broadway ferries, Brooklyn, and the Manhattan terminus of the Williamsburg Bridge, to Prospect Park at the corner of Melbone Street and Flatbush Avenue. Said railroads, owned and operated by said defendant company as aforesaid, are situated in the State of New York and upon the public streets thereof. Under the laws of the State of New York the said defendant The Coney Island and Brooklyn Railroad Company is authorized by reason of the public nature of its business to exercise the right of eminent domain and substantial portions of the land now occupied and used by its railroads were acquired by it in condemnation proceedings in the exercise of said right of eminent domain.

The business conducted by said defendant company is solely and exclusively that of owning maintaining and operating the railroads aforesaid, on which passengers are transported for hire. Said defendant is not engaged in the transaction of any business between the State of New York and any foreign country or between the State of New York and any other of the United States or territories thereof.

Second. The capital stock of said defendant The Coney Island and Brooklyn Railroad Company consists of the sum of $2,983,900.00, divided into shares of the par value of One hundred Dollars each. Said defendant company now has and for several years last past has had a bonded indebtedness of $3,500,000 as follows:

5 $2,000,000 of four per cent bonds issued under the First Consolidated Mortgage of said The Coney Island and Brooklyn Railroad Company to The Mercantile Trust Company, Trustee, dated May 20, 1898, and $1,500,000 of four per cent bonds issued under the Consolidated Mortgage of said defendant company to The Mercantile Trust Company, Trustee, dated December 15, 1904. In addition to the aforesaid mortgage bonds the said defendant company has and during the year ending December 31, 1909, had other indebtedness in excess of $200,000.

Third. Your orator further shows that the net income received by the said defendant The Coney Island and Brooklyn Railroad Company from all sources during the year ending December 31, 1909, as appears from the monthly reports of said company to the Public Service Commission of the State of New York, amounted to a sum in excess of $205,000 after making all deductions of the character provided for in Section 38 of the Act of Congress approved August 5th, 1909, entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes."

Fourth. Your orator further shows that by the Laws of the State of New York and the charter of said defendant The Coney Island and Brooklyn Railroad Company, it is among other things provided that the affairs of said Company shall be managed and conducted by a Board of thirteen directors. The defendants Slaughter W. Huff, William H. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, constitute the present Board of Directors of said Company and as such

6 are now managing and conducting all and singular the business and affairs of said Company.

Fifth. Your orator further shows that he became the owner and registered holder of ten shares of the capital stock of said defendant The Coney Island and Brooklyn Railroad Company more than ten years ago and that he has ever since been and still is the registered holder and owner in his own right of said shares, which are of large value. The capital stock of said Company is divided among a large number of different persons who as such stockholders constitute a large body, and this suit is for an object common to all. Your orator therefore brings this suit in his own name and in his own behalf

both as a stockholder in said Company and also as a representati
and on behalf of such other stockholders similarly situated a
interested as may choose to intervene and become parties thereto.

Sixth. Your orator further shows that, as he is informed a
verily believes, the defendant The Coney Island and Brooklyn Ra
road Company and a majority of its directors who are managi
and conducting its business and affairs as aforesaid, have announc
that under and by virtue of the alleged authority of the provisio
of Section 38 of the Act of Congress of the United States entitl
"An Act to Provide Revenue Equalize Duties and Encourage t
Industries of the United States and for other Purposes", they inte
voluntarily to make and file with the Collector of Internal Revenu
prior to the 1st day of March, 1910, a return or statement in t
form prescribed by said Section of said Act, showing in detail t
amount of net income of said Company for the year endi
7 December 31, 1909, and voluntarily to pay to the said C
lector of Internal Revenue on or before the 30th day
June, 1910, a tax of one per cent upon the entire net income
the said The Coney Island and Brooklyn Railroad Company ov
and above Five thousand Dollars received by it from all soure
during the calendar year ending December 31, 1909, after maki
the deductions provided for in said section of said Act. Your orat
further shows that the tax which the defendant The Coney Isla
and Brooklyn Railroad Company would have to pay upon its n
income for the year ending December 31, 1909, under the pr
visions of said section of said Act would, as your orator is informe
and verily believes, exceed the sum of $2,000.

Seventh. Your orator avers that the provisions of said Act purpo
ing to levy a special excise tax upon all corporations with respect
the carrying on or doing business by such corporations and measur
by a percentage upon their net income are unconstitutional, nu
and void, in that

(*a*) The said tax is in effect a tax upon the corporate existence
franchise of corporate capacity of the defendant The Coney Isla
and Brooklyn Railroad Company, and is therefore a tax upon t
exercise by the State of New York of sovereign powers and functio
not surrendered to the United States and clearly reserved to sa
State of New York by the Tenth Amendment to the Constitutio
of the United States.

(*b*) The said tax is in effect an interference with a governmenta
agency or instrumentality of the State of New York.

8 (*c*) The said tax constitutes in effect an interference wit
the exercise by the State of New York of a governmenta
function, to wit: the function of providing means of transit an
inter-communication for its citizens and the public.

Eighth. Your orator further avers that the provisions of the afor
said Act of Congress imposing the said tax are unconstitutiona
null and void, in that they are not uniform throughout the Unite
States as required in and by Section 8 of Article I of the Constitu
tion of the United States, and in that the same are arbitrary an
unequal in violation of the Constitution and the Fifth Amendme

thereof, and the fundamental principles of taxation and are in excess of the powers of taxation surrendered to the general government by the States and the people thereof.

And your orator further avers that the said tax is unequal and arbitrary and is not uniform throughout the United States.

(*a*) Because the tax is measured not by the income derived from the business carried on, but by the income of the owner derived from all sources whatsoever.

(*b*) Because said tax is imposed upon corporations measured by a percentage upon their net income, whereas no similar tax is imposed upon the income of either individuals or ordinary partnerships although they may be engaged in the same general business.

(*c*) Because labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders or associations operating under the lodge system, domestic building and loan associations
9 organized and operated exclusively for the mutual benefit of their members, all of which are corporations, are specifically exempted in and by said act from all liability for the tax imposed thereby.

(*d*) Because all corporations whose net income for any one calendar year does not exceed five thousand dollars are specifically exempted in and by said Act from the tax imposed thereby.

(*e*) Because by said Act a larger tax is imposed upon the defendant The Coney Island and Brooklyn Railroad Company by reason of the fact that its indebtedness exceeds the amount of its paid up capital stock than upon other corporations engaged in the same general business whose capital stock exceeds their indebtedness.

Ninth. Your orator further avers that the provisions of said Act prescribing said tax are unconstitutional, null and void in that the corporations subject thereto may, by virtue of the aforesaid arbitrary and unequal exactions of such provisions, be deprived of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

Tenth. Your orator further avers that the franchises of the defendant The Coney Island and Brooklyn Railroad Company to construct, maintain and operate its said railroads, including its right to occupy the public streets, are by the laws of the State of New York defined to be real estate, and that substantially the entire income of said Company is derived from the exercise of said franchises; that if the said tax under the aforesaid Act be con-
10 strued as a tax upon the franchises of the said Company regarded as property or as a tax upon income, the provisions of the Act imposing said tax are unconstitutional, null and void, because it is a direct tax upon real estate and personal property or the income therefrom, and is not apportioned among the several States according to population, as required by Sections 2 and 8 of Article I of the Constitution of the United States.

Eleventh. Your orator further avers that the said provisions of said Act imposing said tax are unconstitutional, null and void, in that all corporations thereby taxed may be compelled to produce and disclose their private books and papers in order to make them liable

to a penalty or to forfeit their property in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Twelfth. Your orator further shows that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and that he has duly requested the defendant The Coney Island and Brooklyn Railroad Company and its directors in writing to omit and refuse to pay and to refrain from paying said tax, and to contest the constitutionality of said Act, and to refrain from voluntarily making the return required by said Act, and to apply to a court of competent jurisdiction to determine said Company's liability under said Act and that a copy of said request is hereto annexed as Exhibit "A" and made a part of this Bill of Complaint; but that said defendant The Coney Island and Brooklyn Railroad Company and a
11 majority of its directors, after a meeting of said directors at which the matter and said request were formally laid before them for action, refused and still refuse and intend omitting to comply with your orator's demand, and have resolved and determined and intend to comply with all and singular the provisions of said Section 38 of said Act of Congress, and to make the return therein provided for, and to pay the tax upon the said Company's net income thereby sought to be imposed. A copy of the refusal of said defendant The Coney Island and Brooklyn Railroad Company is annexed as Exhibit "B" to this complaint.

Thirteenth. Your orator further shows that if the defendant The Coney Island and Brooklyn Railroad Company and its directors, as they propose and have declared their intention to do, pay said tax out of the net income of said defendant company, they will thereby diminish the assets of said Company and lessen the value of its stock including the stock held by your orator, and lessen the dividends thereon.

Fourteenth. Your orator further shows that the voluntary compliance by the defendant The Coney Island and Brooklyn Railroad Company and its directors with the provisions of said Act of Congress insofar as it seeks to impose a tax upon said defendant Company will expose said defendant Company to the risk of a multiplicity of suits by and on behalf of its numerous shareholders, and that such numerous suits would work irreparable injury to the business of said defendant company and involve it and its stockholders including your orator in great and irreparable loss.

12 Fifteenth. Your orator further shows that this is a suit of a civil nature in equity, that the matter in dispute exceeds exclusive of interest and costs, the sum or value of Two thousand dollars, and arises under the Constitution and laws of the United States, and that your orator and other stockholders of said defendant company have no adequate remedy at law in the premises; that the contemplated action by the said defendant Company and its directors, the individual defendants, in voluntarily complying with the provisions of said Act of Congress as aforesaid, is contrary to equity and good conscience and will tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore, and in consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable, your orator prays

1. That it be adjudged and decreed that the provisions of said Section 38 of said Act of Congress, approved August 5th, 1909, purporting to impose a special excise tax upon the defendant The Coney Island and Brooklyn Railroad Company, are unconstitutional, null and void;

2. That the defendants be restrained from voluntarily complying with the provisions of said Act and from making the return or statement required thereby and from paying the tax aforesaid;

3. That your orator may have such other and further or
13 different relief in the premises as to a court of equity may seem meet.

To the end therefore that said defendants may if they can show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said The Coney Island and Brooklyn Railroad Company under its corporate seal and the said individual defendants not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and they were specially interrogated thereunto; may it please your Honors to grant unto your orator a subpœna *ad respondendum* issuing out of and under the seal of this Honorable Court, directed to the said defendants The Coney Island and Brooklyn Railroad Company and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, as directors of said The Coney Island and Brooklyn Railroad Company, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answers make to all and singular the premises, and further, to perform and abide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional and a writ of per-
14 petual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed, and your orator as in duty bound will ever pray, &c.

ALEXANDER & GREEN,
Solicitors for Complainant,
120 *Broadway, New York City.*

R. V. LINDABURY,
CHARLES W. PIERSON,
Of Counsel.

15 UNITED STATES OF AMERICA,
Eastern District of New York, County of Kings, ss:

Wyckoff Van Derhoef, the complainant in the foregoing bill named, being duly sworn on his oath says that the matters and things in the said bill set forth in so far as they relate to his own acts and deeds are true and so far as they relate to the acts and deeds of others he believes them to be true.

WYCKOFF VAN DERHOEF.

Sworn and subscribed to before me this 21st day of January 1910.

[SEAL.] R. DAMM,
Notary Public, Kings County, New York.

16 EXHIBIT "A."

To The Coney Island and Brooklyn Railroad Company, and to Messrs. S. W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, J. H. Walbridge, Harold Fitz Gerald, F. R. Ford, Duncan B. Cannon, Directors of said Company.

SIRS: I am a stockholder in The Coney Island and Brooklyn Railroad Company and am informed that the company intends to voluntarily comply with the requirements of Section 38 of the act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," which became a law August 5, 1909, known as the tariff act, and which purports to impose a "special excise" tax upon all corporations in the United States organized for profit and having a capital stock represented by shares, equivalent to 1% upon their annual net earnings, beginning with the year ending December 31, 1909.

I claim that the provisions of said act of Congress in respect to said tax are unconstitutional. As a stockholder of The Coney Island and Brooklyn Railroad Company I hereby protest against any action of the company and its directors in voluntarily complying with the provisions of said act imposing the said tax, and I request that said company and its directors shall refrain from voluntarily complying with any of said provisions, and from voluntarily paying the tax provided for therein, and from voluntarily making returns and statements in its behalf. I further request that said company and its directors shall contest the constitutionality of said act and protect its stockholders and apply to a court of competent jurisdiction to determine its liability under the same, or take such steps as may be necessary to protect the rights of the railroad company's stockholders.

Very truly yours,
(Sgd.) WYCKOFF VAN DERHOEF.

January 18, 1910.

17

EXHIBIT "B."

Coney Island and Brooklyn Railroad Co.,
Cor. De Kalb and Franklin Aves.

BROOKLYN, N. Y., *January 19th*, 1910.

Wyckoff Van Derhoef, Esq., Brooklyn, N. Y.

DEAR SIR: Referring to your circular of the 18th instant, addressed to this Company and its Directors, we have to say that the Board of Directors at a meeting held this day considered the matter, and we hand you herewith a certified copy of the resolution which they passed in relation to your request.

Yours truly,

THE CONEY ISLAND & BROOKLYN R. R. CO.,

(Sgd.) By DUNCAN B. CANNON, *Secretary.*

(*Enclosure Referred to in the Foregoing Letter.*)

NEW YORK, *January* 19th, 1910.

At a meeting of the Board of Directors of The Coney Island and Brooklyn Railroad Company duly held this day the following resolution was passed:

"Resolved: that the Board of Directors deem it inexpedient to comply with the demand of Mr. Van Derhoef on the ground that the failure to comply with the provisions of Section 38 of the Act of Congress entitled 'An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes', approved August 5, 1909, would subject the Company to litigation with the United States and the risk of incurring penalties and of clouding the title to its real estate."

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Board of Directors of The Coney
18 Island and Brooklyn Railroad Company.

(Signed) DUNCAN B. CANNON,
Secretary.

[CORPORATE SEAL.]

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 22, 1910. John A. Shields, Clerk.

19 *Demurrer.*

In the Circuit Court of the United States, for the Southern District of New York.

In Equity.

WYCKOFF VAN DERHOEF, Complainant,
against
THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and S. W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, J. H. Walbridge, Harold Fitzgerald, F. R. Ford, Guy Richards, Edwin S. Marstow, Allan McCulloh, and Duncan B. Cannon, Directors of said Company, Defendants.

The Demurrer of the Coney Island and Brooklyn Railroad Company and the Other Defendants Above Named to the Complainant's Bill of Complaint Herein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants or any one or more of them, and that it appeareth by the complainant's own showing by the said bill that he is not entitled to the relief prayed by the said bill of complaint against these defendants.

Wherefore, and for divers other good causes of demurrer
20 appearing in the said bill, these defendants separately and severally demur thereto and pray the judgment of this honorable court whether they shall be compelled to make any answer to said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

DYKEMAN, OELAND & KUHN,
Solicitors for Defendants, 189 *Montague Street, Brooklyn, N. Y.*

I, William N. Dykman, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is in my opinion well founded in law.

WILLIAM H. DYKMAN.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, S. W. Huff, being duly sworn, depose and say that I am President of The Coney Island and Brooklyn Railroad Company, one

of the defendants above named, and that the foregoing demurrer is not interposed for the purposes of delay.

S. W. HUFF.

Sworn to before me this 24th day of January, 1910.

JOHN A. THAKE,
Notary Public, Kings County, N. Y.

Endorsed: Due service of a copy of within Demurrer is hereby admitted. Dated January 21, 1910, Alexander & Green, Attorney for Complainant. U. S. Circuit Court, Southern District of N. Y. Filed Jan. 24, 1910. John A. Shields, Clerk.

21 *Notice of Hearing on Bill and Demurrer.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

WYCKOFF VAN DERHOEF, Complainant,
against
THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh, and Duncan B. Cannon, Directors of said Company, Defendants.

You will please take notice that this cause will be brought to a hearing on bill and demurrer filed therein before Honorable Learned Hand, United States judge, on the 25th day of January, 1910, at twelve o'clock noon or as soon thereafter as counsel can be heard.
Dated, New York, January 25th, 1910.

ALEXANDER & GREEN,
Solicitors for Complainant, 120 Broadway, New York City, N. Y.

To Messrs. Dykman, Oeland & Kuhn, Solicitors for Defendants, 189 Montague Street, Brooklyn, N. Y.

Due and timely service of the foregoing notice of hearing in the above-entitled suit is hereby admitted.
Dated, January 25, 1910.

DYKMAN, OELAND & KUHN,
Solicitors for Defendants.

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 25, 1910. John A. Shields, Clerk.

22 *Final Decree Sustaining Demurrer and Allowance of Appeal.*

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, Held at the United States Post Office and Court House Building, in the City of New York (Borough of Manhattan), this 25th Day of January, A. D. 1910.

Present: Honorable Learned Hand, U. S. Judge.

In Equity.

WYCKOFF VANDERHOEF, Complainant,
against
THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, Directors of Said Company, Defendants.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having heard in support of said demurrer and in opposition thereto, it is by the court now here—

Ordered and decreed that the said demurrer be sustained, and that the bill of complaint of the complainant above named be, and the same is hereby, dismissed with costs.

LEARNED HAND, *U. S. J.*

Thereupon the above-named complainant states that in this case the constitutionality of a law of the United States is drawn
23 in question and in open court prays an appeal from said final decree direct to the Supreme Court of the United States pursuant to the statute in such case made and provided. It is therefore further—

Ordered that the said appeal be, and the same is hereby, allowed as prayed for in open court.

The said defendants then admitted in open court due notice of the said appeal and duly waived service of any citation thereon.

LEARNED HAND, *U. S. J.*

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 25, 1910, John A. Shields, Clerk.

24 *Assignment of Errors.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

WYCKOFF VANDERHOEF, Complainant,
against
THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, Directors of Said Company, Defendants.

And now comes the complainant above-named, by Alexander & Green, his solicitors, and, in connection with the complainant's petition of appeal from the final decree made and entered herein on the 25th day of January, 1910, dismissing complainant's bill of complaint with costs, makes and files the following assignment of errors in pursuance of the statute and rule in such case made and procided.

I.

That the Court erred in refusing to hold that so much of Section 38 of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes," approved August 5, 1909, as relates to the levying and collection of a special excise tax from certain corporations and joint stock companies, including
25 the defendant The Coney Island and Brooklyn Railroad Company, measured by a percentage upon their net income, is unconstitutional, null and void, in that said provisions of said act require the imposition of a tax upon the exercise by the several States, and in their application to defendant The Coney Island and Brooklyn Railroad Company upon the exercise by the State of New York, of sovereign powers and functions not surrendered to the United States and specially reserved to the States by the Tenth Amendment to the Constitution of the United States.

II.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that in their application to defendant The Coney Island and Brooklyn Railroad Company the tax thereby attempted to be imposed is in effect an interference with a governmental agency or instrumentality of the State of New York.

III.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that in their application to defendant The Coney Island and Brooklyn Railroad Company the tax thereby attempted to be imposed constitutes in effect an interference with the exercise by the State of New York of a governmental function.

IV.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that they
26 provide for and require the imposition of a direct tax upon the real and personal property of corporations and joint stock companies, and in their application to defendant The Coney Island and Brooklyn Railroad Company upon the real and personal property of such Company, without apportionment among the several States according to population as required by Sections 2 and 8 of Article I of the Constitution of the United States.

V.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that they provide for and require the imposition of a non-uniform, arbitrary and unequal tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies, measured not by the amount of business done by such corporations or joint stock companies, but by the entire net income of such corporations or joint stock companies, over and above $5,000, received by them from all sources, in violation of the Constitution of the United States and in particular of the Due Process Clause of the 5th Amendment thereof, and of the fundamental principles of taxation, and in excess of the powers of taxation surrendered to the general government by the states and the people thereof.

VI.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void, in that they provide for and require the imposition of a non-uniform, arbitrary and unequal tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corpora-
27 tions and joint stock companies, without subjecting to such tax copartnerships and individuals engaged in carrying on or doing similar businesses, in violation of the Constitution of the United States and in particular of Section 8 of Article I and the Due Process Clause of the 5th Amendment thereof and of the fundamental principles of taxation, and in excess of the powers of taxation surrendered to the general government by the States and the people thereof.

VII.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies without subjecting to such tax labor, agricultural and horticultural organizations and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members.

VIII.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require a larger tax in the case of the defendant The Coney Island and Brooklyn Railroad Company by reason of the fact that its indebtedness exceeds the amount of its paid up capital stock, than is imposed upon other corporations engaged in the same general business whose capital stock equals or exceeds their indebtedness.

28

IX.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that under the provisions thereof the corporations and joint stock companies made subject to the tax therein provided for, and in particular the defendant the Coney Island and Brooklyn Railroad Company, may be compelled to produce and disclose their private books and papers in order to make them liable to a penalty or to a forfeiture of their property, in violation of Articles IV and V of the Amendments to the Constitution of the United States.

X.

That the Court erred in not granting to the complainant the relief prayed in and by his bill of complaint, or any part thereof.

XI.

That the Court erred in sustaining the demurrer to said bill of complaint.

XII.

That the Court erred in dismissing the said bill of complaint with costs.

Dated, New York, January 25, 1910.

ALEXANDER & GREEN,
Solicitors for Complainant.

R. V. LINDABURY,
CHARLES W. PIERSON,
Of Counsel.

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 25, 1910. John A. Shields, Clerk.

29 *Supersedeas Bond.*

In the Circuit Court of the United States for the Southern Distri
of New York.

In Equity.

WYCKOFF VANDERHOEF, Complainant,
against
THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY an
Slaughter W. Huff, William N. Dykman, James H. Hyde, Georg
H. Prentiss, William H. McIntyre, Charles T. Young, John F
Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richard
Edwin S. Marston, Allan McCulloh and Duncan B. Cannon
Directors of Said Company, Defendants.

Know all men by these presents that we, Charles E. Phelps an
Samuel S. McCurdy, are held and firmly bound unto the abov
named defendants in the sum of Five hundred dollars ($500) to b
paid to the said defendants; for the payment of which, well and trul
to be made, we bind ourselves and each of us, our and each of ou
heirs, executors, and administrators, jointly and severally, firmly b
these presents.

Sealed with our seals and dated the 25th day of January, in th
year of our Lord 1910.

The condition of this obligation is such that whereas the said d
fendants above named have obtained a decree in the Circuit Cou
of the United States for the Southern District of New York, su
taining the defendants' demurrer and dismissing the bill of com
plaint of the complainant with costs, which said decree wa
30 entered on the 25th day of January, 1910; and whereas th
said complainant Wyckoff Van Derhoef, in order to obtain
reversal of the same, hath obtained the allowance in open court of
petition of appeal to the Supreme Court of the United States:

Now, therefore, if the above-named Wyckoff Van Derhoef sha
prosecute his said appeal to effect and if he fail to make his plc
good shall answer all damages and costs, then this obligation sha
be void; otherwise the same shall remain in full force and virute.

CHARLES E. PHELPS. [L. S.]
SAMUEL S. McCURDY. [L. S.]

Sealed and delivered and taken and acknowledged this 25th da
of January, 1910, before me.

[SEAL.] R. DAMM,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

Approved by
LEARNED HAND,
U. S. Judge.

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 2
1910, John A. Shields, Clerk.

31 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages numbered from one to thirty inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause entitled Wyckoff Van Derhoef, Complainant-Appellant, against The Coney Island and Brooklyn Railroad Company and Slaughter W. Huff, William N. Dykman, James H. Hyde, George H. Prentiss, William H. McIntyre, Charles T. Young, John H. Walbridge, Harold Fitz Gerald, Frank R. Ford, Guy Richards, Edwin S. Marston, Allan McCulloh and Duncan B. Cannon, Directors of said Company, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of January, in the year of our Lord One Thousand Nine hundred and ten and of the Independence of the said United States the One Hundred and thirty-fourth.

[Seal of the U. S. Circuit Court, South Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

I hereby certify that the fee for certifying the transcript of record in the above entitled cause amounted to $9.05.

[Seal of the U. S. Circuit Court, South Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

32 (Endorsed:) Wyckoff Vanderhoef, Compl't-Appellant, vs. The Coney Island and Brooklyn Railroad Co. et als., Def'ts-Appellees. Transcript of Record on Appeal.

Endorsed on cover: File No. 21,977. S. New York, C. C. U. S. Term No. 751. Wyckoff Van Derhoef, Appellant, vs. The Coney Island & Brooklyn Railroad Company et al. Filed January 26th, 1910. File No. 21,977.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920

No. 1023440

FRANCIS L. HINE, APPELLANT,

vs.

HOME LIFE INSURANCE COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 3D, 1921.

(21,978)

(21,978)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 752.

FRANCIS L. HINE, APPELLANT,

vs.

HOME LIFE INSURANCE COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1910.

1 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

FRANCIS L. HINE, Complainant,
against
HOME LIFE INSURANCE COMPANY, and THOMAS H. MESSENGER, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., Directors of Said Company, Defendants.

To the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, Sitting in Equity:

Your orator, Francis L. Hine, a citizen of the State of New York, and a resident of the Borough of Manhattan in the City of New York in said State, brings this his bill of complaint in behalf of himself and all other stockholders and policyholders of the defendant Home Life Insurance Company who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit, against said Home Life Insurance Company, and Thomas H. Messenger, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. LeGrande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr.,
2 as directors thereof, and thereupon complains and shows:

First. That the defendant Home Life Insurance Company is a corporation duly organized and existing under and by virtue of the laws of the State of New York relating to life insurance companies and is a citizen of said State; that the principal office of said company is in the Borough of Manhattan in the Southern District of New York; that its capital stock now consists, and for many years last past has consisted, of the sum of $125,000, divided into 1250 shares of the par value of $100 each, and that its capital stock, accumulated profits and other assets exceed in value the sum of $22,000,000.

Second. That said defendant Home Life Insurance Company is authorized by its charter and the public laws of the State of New York to make insurance on the lives of individuals and every insurance appertaining thereto or connected therewith, and to grant, purchase or dispose of annuities, and that such is the business in which it is engaged: that it is required by the laws of the

State of New York to invest its capital to the extent of $100,000, in the stocks or bonds of the United States or of the State of New York, or in the bonds of a county or incorporated city of said State authorized to be issued by the Legislature thereof, or in bonds and mortgages on improved unencumbered real property in the State of New York, and is authorized by said laws to invest the residue of its capital and its surplus money and funds in the securities aforesaid or in the public stocks or bonds of any one of the United States, or upon the security of improved unencumbered real property in any state, or, within certain limitations, in the stocks, bonds, or
3 other evidences of indebtedness of any solvent institution incorporated under the laws of the United States or of any state thereof, or in such real estate as may be requisite for the convenient transaction of its business.

Third. That the property and assets of said defendant Home Life Insurance Company amounted on the thirty-first day of December, 1908, to the sum of $21,708,000 and upwards, as appears by the report of said company to the Superintendent of Insurance for the State of New York for the year 1908; that, as also appears by said report, said assets were then invested as follows: In real estate owned by said company in fee $1,643,609.81; in United States Government bonds $11,193; in bonds of the State of New York $109,500; in corporate stocks of the City of New York $102,160; in bonds of other municipal corporations within the United States $53,800; in the bonds and stocks of other solvent institutions incorporated under the laws of the United States or of one or more of the States upwards of $10,000,000; and in real estate bonds and mortgages $6,105,030. That as appears by said report the assets of said defendant Company, on December 31, 1908, invested as aforesaid, included $1,112,000 and upwards of "unassigned funds", said unassigned funds being undivided profits. Your orator is informed and believes and therefore alleges that the assets and "unassigned funds" aforesaid of said corporation have increased since December 31, 1908, and that it still retains substantially all of the aforesaid investments and derives a large income therefrom.

Fourth. That the net income of the defendant Home Life Insurance Company during the year ending December 31, 1909,
4 amounted to a sum in excess of $450,000 after making all deductions of the character provided for in the second and third paragraphs of Section 38 of the Act of Congress approved August 5th, 1909, entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes", a large part of which income was derived from the investments hereinbefore mentioned.

Fifth. That by the laws of the State of New York and the charter of the said Home Life Insurance Company, it is, among other things, provided that the corporate powers of said Company shall be vested in a Board of Directors to consist of not less than thirteen nor more than twenty-three persons, and that said powers shall be exercised by such Board and by such officers and agents as it may appoint and empower. The defendants Thomas H. Messenger, J.

Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. LeGrande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., together with your orator, constitutes the present Board of Directors of said Company, and as such are now managing and conducting all and singular the business and affairs of said Company.

Sixth. Your orator further shows that he became the owner and registered holder of ten shares of the capital stock of said defendant Home Life Insurance Company a number of years ago, and that he has ever since been and still is the registered holder and owner in his own right of said shares, the value of which
5 exceeds the sum of $2000. By the charter of said Home Life Insurance Company it is provided that the holders of its capital stock shall be entitled to receive semi-annually out of the net profits of said Company six per cent in dividends on the amount of stock held by them respectively, but that beyond the amount of their capital stock and the dividends aforesaid, they shall not share in the funds or profits of the Company except as they may be entitled as policyholders, and then equally with other holders of policies in said Company. That capital stock of said Home Life Insurance Company is divided among a large number of different persons who, as such stockholders, constitute a large body, and this suit is for an object common to them all. The charter of said Home Life Insurance Company further provides that the insurance business of the Company shall be conducted on the principle of giving to policyholders an interest in the profits of the Company unless it shall be otherwise agreed between the Company and the insured, and further provides that the net profits of said Company shall be ascertained annually and shall be apportioned to the holders of policies who may be entitled to participate in the profits according to their respective contributions thereto. On or about the sixth day of November, 1891, said Company issued to your orator its policy of insurance, which policy is still in force, whereby it promised to pay to your orator the amount of $2500 on the sixth day of November, 1911, or in case of his previous decease to his wife Mary I. Hine, or if she shall not survive him to his executors, administrators or assigns, and in the meantime to accord to your orator participation in the profits
6 of the Company as the same should be ascertained and apportioned from year to year according to the said provisions of its charter. The policyholders of said Home Life Insurance Company holding policies which entitle them to share annually in the profits of said Company, are very numerous, comprising, as your orator is informed and believes, more than forty-three thousand in number and representing in the aggregate more than eighty-one million Dollars of life insurance, and this suit is for an object common to them all. Your orator therefore brings this suit in his own name and in his own behalf as a stockholder and policyholder in said Home Life Insurance Company and also as a representative and on behalf of such of the other stockholders and policyholders in said

Company as are similarly situated and interested and may choose to intervene and become parties hereto.

Seventh. That the defendant Home Life Insurance Company and a majority of its directors assert and declare that they intend to voluntarily make and file with the Collector of Internal Revenue, prior to the first day of March, 1910, a return or statement in the form prescribed by Section 38 of the Act of Congress of the United States entitled, "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes", approved August 5th, 1909, showing in detail the amount of net income of said Company for the year ending December 31, 1909 and to voluntarily pay to the said Collector of Internal Revenue, on or before the 30th day of June, 1910, a tax of one per cent upon the entire net income of the said Home Life Insurance Company over and above Five Thousand Dollars received by it from all
7 sources during the calendar year ending December 31, 1909, after making the deductions provided for in said Act. Your orator further shows that the tax which the defendant Home Life Insurance Company would have to pay upon its net income for the year ending December 31, 1909, under the provisions of said section of said Act would exceed the sum of $4500.

Eighth. Your orator avers that the provisions of said Act purporting to levy upon corporations, joint stock companies or associations organized for profit and having a capital stock represented by shares, and insurance companies, a special excise tax with respect to the carrying on or doing business by such corporations or companies, measured by a percentage upon their net income as aforesaid, are unconstitutional, null and void in that:

(*a*) If the tax attempted to be imposed by said Act is to be regarded as a tax upon the franchises or the exercise of the franchises of such corporations and companies, it is a tax upon the exercise by the several States of sovereign powers and functions not surrendered to the United States and specially reserved to them by the Tenth Amendment to the Constitution of the United States, and of privileges granted thereunder.

(*b*) If said tax is to be regarded as a tax not upon the privilege of exercising corporate or other franchises but upon such franchises regarded as property, the provisions attempting to impose the same are unconstitutional, null and void, in that said tax is direct and is not apportioned among the several States according to population as required by Sections 2 and 8 of Article I of the Constitution of the United States.

8 (*c*) If the said tax is to be regarded as a tax not upon corporate or other franchises but upon the net income of the corporations and companies subject thereto, the provisions of the Act attempting to impose the same are unconstitutional, null and void, in that the tax is imposed upon the income derived from stock and bonds issued by the several States and the municipalities thereof which are beyond the taxing powers of Congress; and furthermore in that the tax is imposed upon income derived from real estate and personal property, and is therefore in effect a direct tax upon such

property, and is not apportioned among the several States according to population, as required by Sections 2 and 8 of Article I of the Constitution of the United States.

(*d*) If the said tax is to be regarded as a tax upon occupation or the carrying on of business, the provisions of the Act attempting to impose the same are unconstitutional, null and void, in that the tax is not uniform throughout the United States as required by Section 8 of Article I of the Constitution of the United States, and in that the same is arbitrary and unequal, in violation of the said Constitution and the Fifth Amendment thereof and the fundamental principles of taxation, and in excess of the powers of taxation surrendered to the General Government by the States and the people thereof.

And your orator avers that the said tax falls within one or more of the aforesaid classes of taxes.

Ninth. Your orator avers that the said tax attempted to be imposed by the 38th Section of said Act is unequal and arbitrary, and is not uniform throughout the United States:

(*a*) Because the tax is measured, not by the income de-
9 rived from the business carried on but by the income of the owner derived from all sources whatsoever;

(*b*) Because corporations and associations, known as fraternal beneficiary societies, operating under the lodge system, are exempted in and by said Act from all liability for the tax imposed thereby, whereas insurance companies doing the same or a substantially similar business but not operating under the lodge system are made liable to the tax;

(*c*) Because labor, agricultural and horticultural organizations, and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, are exempted in and by said Act from all liability for the tax imposed thereby;

(*d*) Because said tax is imposed upon corporations, joint stock and insurance companies, measured by a percentage upon their net income, whereas no similar tax is imposed upon the income of individuals and ordinary partnerships even when engaged in the same line of business;

(*e*) Because all corporations and joint stock companies whose net income for any one calendar year does not exceed five thousand dollars are specifically exempted in and by said Act from the tax imposed thereby.

Tenth. Your orator further avers that the provisions of said Act prescribing said tax are unconstitutional, null and void, in that the corporations and companies subject thereto may, by virtue of the aforesaid arbitrary and unequal exactions of such provisions, be deprived of their property without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

Eleventh. Your orator further avers that the provisions
10 for said tax incorporated in said Act of Congress, as aforesaid, are unconstitutional, null and void, in that the corporations and companies thereby attempted to be taxed may be compelled to produce and disclose their private books and papers in order to make

them liable to a penalty or to forfeit their property in violation of Articles IV and V of the Amendments to the Constitution of the United States.

Twelfth. Your orator further shows that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and that he has duly requested the defendant Home Life Insurance Company and its directors, other than your orator, and each of them, in writing, to omit and refuse to pay and to refrain from paying said tax, and to contest the constitutionality of said Act, and to refrain from voluntarily making the return required by said Act, and to apply to a Court of competent jurisdiction to determine said Company's liability under said Act, and that a copy of said request is hereto annexed as Exhibit "A" and made a part of this bill of complaint; but that said defendant Home Life Insurance Company and a majority of its directors after a meeting of said directors at which the matter and said request Exhibit "A" were formally laid before them for action, refused and still refuse and intend omitting to comply with your orator's demand, and, have resolved, determined and intend to comply with all and singular the provisions of said Act of Congress, and to make the return therein provided for, and to pay the tax upon said Company's net income thereby sought to be imposed. That a copy of the refusal of said defendant Home Life Insurance
11 Company is annexed as Exhibit "B" to this complaint. That your orator was present at such meeting and voted against the resolution set forth in said Exhibit "B."

Thirteenth. Your orator further shows that if the defendant Home Life Insurance Company and its directors, as they propose and have declared their intention to do, pay said tax upon the net income of the defendant Home Life Insurance Company, they will thereby diminish the assets of said Company and lessen the fund applicable to the payment of dividends on your orator's stock and your orator's insurance policy and on the stock and insurance policies held by other stockholders and policyholders of said Home Life Insurance Company similarly situated with your orator, and will thereby lessen the value of your orator's said stock and said insurance policy and the value of the stock and insurance policies of all other stockholders and policyholders who are similarly situated. Your orator further shows that it would be impossible to ascertain and measure the amount of damage and loss to your orator which would result from the payment of said tax or the amounts by which the value of your orator's aforesaid stock and insurance policy would thereby be lessened, and that the damage to your orator would therefore be irreparable and incapable of ascertainment in an action at law.

Fourteenth. Your orator further shows that the voluntary compliance by the defendant Home Life Insurance Company with the provisions of said Act of Congress will expose the defendant Home Life Insurance Company to the risk of a multiplicity of suits not only by and on behalf of its numerous shareholders but also by
12 and on behalf of its numerous policyholders, and that in such suits all the policyholders of the Company, including

your orator, would or might be necessary and proper parties by reason of their interest in the net income of said Company and in preserving the same for distribution among its policyholders, and that such numerous suits would work irreparable injury to the business of said Company and to your orator and to the Company's other stockholders and participating policyholders.

Fifteenth. Your orator further shows that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two thousand dollars, and arises under the Constitution and laws of the United States.

That the action contemplated by the defendant Home Life Insurance Company and its directors, the individual defendants, in voluntarily complying with the provisions of said Act of Congress, as aforesaid, is contrary to equity and good conscience and will tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore, and in consideration whereof, and for as much as your orator is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, your orator prays

1. That it be adjudged and decreed that the said taxing provisions incorporated in the 38th Section of said Act of Congress approved August 5, 1909, are unconstitutional null and void;

2. That the defendants be restrained from voluntarily com-
13 plying with the said provisions of said Act and from making the return or statement required thereby and from paying the tax aforesaid;

3. That the defendant Home Life Insurance Company be required to specifically perform the terms of the policy contract held by your orator and the policies held by other policyholders similarly situated, by apportioning to him and them their respective shares of the net income of said Company for the year 1909, without subtraction or diminution by reason of anything contained in the said 38th Section of the Act of Congress approved August 5th, 1909.

4. That your orator may have such other and further or different relief in the premises as to a Court of Equity may seem meet.

To the end therefore that said defendants may if they can show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said Home Life Insurance Company under its corporate seal and the said individual defendants not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and they were specially interrogated thereunto; may it please your Honors to grant unto your orator a subpœna *ad respondendum* issu-
ing out of and under the seal of this Honorable Court, directed
14 to the said defendants Home Life Insurance Company and Thomas H. Messenger, J. Warren Greene, H. E. Pierrepont,

Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., as directors of said Home Life Insurance Company, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answers make to all and singular the premises, and further, to perform and abide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed, and your orator as in duty bound will ever pray, &c.

ALEXANDER & GREEN,
Solicitors for Complainant,
120 *Broadway, New York City.*

R. V. LINDABURY,
ROBERT LYNN COX,
CHARLES W. PIERSON,
Of Counsel.

15 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Francis L. Hine, the complainant in the foregoing bill named, being duly sworn on his oath says that the matters and things in the said bill set forth in so far as they relate to his own acts and deeds are true and so far as they relate to the acts and deeds of others he believes them to be true.

FRANCIS L. HINE.

Sworn and subscribed to before me this 19 day of January, 1910.
[SEAL.]
THOS. T. GRACE,
Notary Public, N. Y. Co.

16 EXHIBIT "A."

To Home Life Insurance Company and to Thomas H. Messenger, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtlandt P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., Directors of Said Company.

SIRS: I am a shareholder and policyholder in the Home Life Insurance Company and am informed that the Company intends to voluntarily comply with the requirements of Section 38 of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the

United States and for other Purposes," which became a law August 5th, 1909, and which purports to impose a special excise tax upon all insurance companies in the United States equivalent to one per cent upon their annual net income beginning with the year ending December 31, 1909.

I claim that the provisions of said Act in respect to said tax are unconstitutional. As a stockholder and policyholder of said Home Life Insurance Company, I hereby protest against any action of the Company and its Directors in voluntarily complying with the provisions of said Act imposing the tax, and I request that said Company and its Directors shall refrain from voluntarily complying with any of said provisions and voluntarily paying the tax provided for therein, and from voluntarily making returns and statements in its behalf. I further request that said Company and its Directors shall contest the constitutionality of said Act and protect its stockholders and policyholders, and apply to a court of competent jurisdiction to determine its liability under said Act or take such steps as may be necessary to protect the rights of the Company's shareholders and policyholders.

Yours very truly,

(Sgd.) FRANCIS L. HINE.

17 EXHIBIT "B."

At a regular meeting of the Board of Directors of the Home Life Insurance Company, held at the office of the Company, in the Borough of Manhattan, City of New York, on January 17th, 1910, the following resolution was duly adopted, Mr. Francis L. Hine voting in the negative:

Resolved: that the Board of Directors deem it inexpedient to comply with the demand of Mr. Hine, on the ground that the failure to comply with the provisions of Section 38 of the Act of Congress entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes" approved August 5, 1909, would subject the Company to litigation with the United States or the revenue officers thereof.

(Sgd.) E. W. GLADWIN, *Secretary.*

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 22, 1910, John A. Shields, Clerk.

18 *Demurrer.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

FRANCIS L. HINE, Complainant,
against
HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall, and William G. Low, Jr., Directors of said Company, Defendants.

The Demurrer of the Home Life Insurance Company and the Other Defendants Above Named to the Complainant's Bill of Complaint Herein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants or any one or more of them, and that it appeareth by the complainant's own showing by the said bill that he is not entitled to the relief prayed by the said bill against these defendants.

Wherefore, and for divers other good causes of demurrer
19 appearing in the said bill, these defendants separately and severally demur thereto and pray the judgment of this honorable court whether they shall be compelled to make any answer to said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

HOWARD VAN SINDEREN,
Solicitor for Defendants, 44 Wall Street, New York.

I, Howard Van Sinderen, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is in my opinion well founded in law.

HOWARD VAN SINDEREN.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, George E. Ide, being duly sworn, depose and say that I am the president of Home Life Insurance Company, one of the defendants above named, and that the foregoing demurrer is not interposed for purposes of delay.

GEO. E. IDE.

Subscribed and sworn to before me this 24 day of January, 1910.

[L. S.]

L. A. BUTLER,
Notary Public, New York County, N. Y.

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 25, 1910, John A. Shields, Clerk.

20 *Notice of Hearing on Bill and Demurrer.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

FRANCIS L. HINE, Complainant,
against
HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall, and William G. Low, Jr., Directors of said Company, Defendants.

You will please take notice that this cause will be brought to a hearing on bill and demurrer filed therein before Honorable Learned Hand, United States judge, on the 25th day of January, 1910, at twelve o'clock noon or as soon thereafter as counsel can be heard.

Dated, New York, January 25th, 1910.

ALEXANDER & GREEN,
Solicitors for Complainant,
120 *Broadway, New York City, N. Y.*

To Howard Van Sinderen, Esq., Solicitor for defendants, 44 Wall Street, N. Y. City.

Due and timely service of the foregoing notice of hearing in the above-entitled suit is hereby admitted.

Dated, January 25th 1910.

HOWARD VAN SINDEREN,
Solicitor for Defendants.

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 25, 1910, John A. Shields, Clerk.

21 *Final Decree Sustaining Demurrer and Allowance of Appea*

At a stated term of the Circuit Court of the United States for th Southern District of New York, held at the United States Po Office and Court House building, in the City of New Yor (Borough of Manhattan), this 25th day of January, A. D. 191

Present: Honorable Learned Hand, U. S. Judge.

In Equity.

FRANCIS L. HINE, Complainant,
against
HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, Warren Greene, H. E. Pierrepont, Thomas T. Barr, George I Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, Joh E. Borne, William M. St. John, John S. Frothingham, Marti Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raver Robert B. Woodward, William A. Marshall, and William G. Lov Jr., Directors of said Company, Defendants.

This cause having come on to be heard upon the bill and th demurrer thereto, and counsel having been heard in support of sai demurrer and in opposition thereto, it is by the court now here—

Ordered and decreed that the said demurrer be sustained, an that the bill of complaint of the complainant above named b and the same is hereby, dismissed with costs.

LEARNED HAND, *U. S. J.*

Thereupon the above-named complainant states that in this case th constitutionality of a law of the United States is drawn in que tion and in open court prays an appeal from said final de
22 cree direct to the Supreme Court of the United States pu suant to the statute in such case made and provided. It i therefore further—

Ordered that the said appeal be, and the same is hereby, allowe as prayed for in open court.

The said defendants then admitted in open court due notice of th said appeal and duly waived service of any citation thereon.

LEARNED HAND, *U. S. J.*

U. S. Circuit Court, Southern District of N. Y., Filed Jan. 25 1910, John A. Shields, Clerk.

23 *Assignment of Errors.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

FRANCIS L. HINE, Complainant,
against
HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall, and William C. Low, Jr., Directors of said Company, Defendants.

And now comes the complainant above-named by Alexander & Green, his solicitors, and, in connection with the complainant's petition of appeal from the final decree made and entered herein on the 25th day of January, 1910, dismissing complainant's bill of complaint with costs, makes and files the following assignment of errors in pursuance of the statute and rule in such case made and provided.

I.

That the court erred in refusing to hold that so much of Section 38 of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes," approved August 5, 1909, as relates to the levying and collection of a special excise tax from certain corporations and joint stock companies, including the
24 defendant Home Life Insurance Company, measured by a percentage upon their entire net income, is unconstitutional, null and void in that said provisions of said Act constitute an interference with the sovereign powers and functions of the several states and, in their application to defendant Home Life Insurance Company, with the sovereign powers and functions of the State of New York.

II.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon the exercise by the several states of sovereign powers and functions not surrendered to the United States and specially reserved to them by the 10th Amendment of the Constitution of the United States.

III.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide

for and require the imposition of a tax upon privileges and franchises granted by the several states, and in their application to the defendant Home Life Insurance Company upon privileges and franchises granted to it by the State of New York in pursuance of the sovereign and exclusive powers and functions of said State.

IV.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a direct tax upon the real
25 and personal property of corporations and joint stock companies, and in their application to defendant Home Life Insurance Company upon the real and personal property of such company, without apportionment among the several states according to population as required by Sections 2 and 8 of Article I of the Constitution of the United States.

V.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon the income derived from state and municipal stocks and bonds owned by corporations and joint stock companies, and in their application to defendant Home Life Insurance Company upon the income derived from state and municipal stocks and bonds owned by such Company.

VI.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a non-uniform, arbitrary and unequal tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies, measured not by the amount of business done by such corporation or joint stock companies, but by the entire net income of such corporations or joint stock companies, over and above $5,000, received by them from all sources, in violation of the Constitution of the United States and in particular of the Due Process Clause of the 5th Amendment thereof, and of the fundamental principles of taxation, and in excess of the powers of taxation
26 surrendered to the general government by the states and the people thereof.

VII.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a non-uniform, arbitrary and unequal tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies, without subjecting to such tax co-partnerships and individuals engaged in carrying on or doing similar businesses, in violation of the Constitution of the United States and in particular

of Section 8 of Article I and the Due Process Clause of the 5th Amendment thereof and of the fundamental principles of taxation, and in excess of the powers of taxation surrendered to the general government by the states and the people thereof.

VIII.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon insurance companies with respect to the carrying on or doing business by such companies, without subjecting to such tax corporations and associations known as fraternal beneficial societies doing the same business but operating under the lodge system.

27

IX.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that they provide for and require the imposition of a tax upon corporations and joint stock companies with respect to the carrying on or doing business by such corporations and joint stock companies without subjecting to such tax labor, agricultural and horticultural organizations and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members.

X.

That the Court erred in refusing to hold that said provisions of said Section are unconstitutional, null and void in that under the provisions thereof the corporations and joint stock companies made subject to the tax therein provided for, and in particular the defendant Home Life Insurance Company, may be compelled to produce and disclose their private books and papers in order to make them liable to a penalty or to a forfeiture of their property, in violation of Articles IV and V of the Amendments to the Constitution of the United States.

XI.

That the Court erred in not granting to the complainant the relief prayed in and by his bill of complaint, or any part thereof.

XII.

That the Court erred in sustaining the demurrer to said bill of complaint.

28

XIII.

That the Court erred in dismissing the said bill of complaint with costs.

Dated, New York, January 25, 1910.

ALEXANDER & GREEN,
Solicitors for Complainant.

R. V. LINDABURY,
CHARLES W. PIERSON,
Of Counsel.

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 25, 1910. John A. Shields, Clerk.

29 *Supersedeas Bond.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

FRANCIS L. HINE, Complainant,
against
HOME LIFE INSURANCE COMPANY and THOMAS H. MESSENGER, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., Directors of said Company, Defendants.

Know all men by these presents that we, Charles E. Phelps and Samuel S. McCurdy, are held and firmly bound unto the above-named defendants in the sum of Five hundred dollars ($500) to be paid to the said defendants; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 25th day of January, in the year of our Lord 1910.

The condition of this obligation is such that whereas the said defendants above named have obtained a decree in the Circuit court of the United States for the southern district of New York, sustaining the defendants' demurrer and dismissing the bill of complaint of the complainant with costs, which said decree was
30 entered on the 25th day of January, 1910; and whereas the said complainant Francis L. Hine, in order to obtain a reversal of the same, hath obtained the allowance in open court of a petition of appeal to the Supreme Court of the United States:

Now, therefore, if the above-named Francis L. Hine shall prosecute his said appeal to effect and if he fail to make his plea good shall answer all damages and costs, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

CHARLES E. PHELPS. [L. S.]
SAMUEL S. McCURDY. [L. S.]

Sealed and delivered and taken and acknowledged this 25th day of January, 1910, before me.

[SEAL.]

R. DAMM,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

Approved by
LEARNED HAND,
U. S. Judge.

U. S. Circuit Court, Southern District of N. Y. Filed Jan. 25, 1910. John A. Shields, Clerk.

31 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages numbered from one to thirty inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Francis L. Hine, Complainant-Appellant, against Home Life Insurance Company and Thomas H. Messenger, J. Warren Greene, H. E. Pierrepont, Thomas T. Barr, George E. Ide, William A. Nash, John F. Praeger, Ellis W. Gladwin, John E. Borne, William M. St. John, John S. Frothingham, Martin Joost, E. Le Grande Beers, Courtland P. Dixon, Anton A. Raven, Robert B. Woodward, William A. Marshall and William G. Low, Jr., Directors of said Company, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of said Court to be hereunto affxed at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of January, in the year of our Lord One thousand Nine hundred and ten, and of the Independence of the said United States the One hundred and thirty-fourth.

JOHN A. SHIELDS, *Clerk.*

I hereby certify that the fee for certifying the transcript of record in the above entitled cause amounted to $9.05.

[Seal of U. S. Circuit Court, South. Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

31½ [Endorsed:] Francis L. Hine, compl't-Appellant, vs. Home Mutual Insurance Co., def'ts-appellees. Transcript of record on appeal.

32 Endorsed on cover: File No. 21,978. S. New York C. C. U. S. Term No. 752. Francis L. Hine, appellant, vs. Home Life Insurance Company et al. Filed January 26th, 1910. File No. 21,978.

Office Supreme Court, U. S.
FILED
JAN 27 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. ~~751~~ 409

WYCKOFF VAN DERHOEF, APPELLANT,

vs.

THE CONEY ISLAND & BROOKLYN RAILROAD COMPANY ET AL.

MOTION TO ADVANCE.

R. V. LINDABURY,
CHARLES W. PIERSON,
Counsel for Appellant.

(21,977.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 751.

WYCKOFF VAN DERHOEF, APPELLANT,

v.

THE CONEY ISLAND & BROOKLYN RAILROAD COMPANY ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE UNDER RULE 26.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

1.

In this cause the constitutionality of a law of the United States (the so-called Corporation Tax Act, being Section 38 of the Act approved August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes") is drawn in question. The constitutionality of the same law is involved in *Flint vs. The Stone Tracy Company et al.*, No. 747, in

which a motion to advance was made January 24, 1910. As will be hereinafter shown this cause raises questions touching the constitutionality of said act which are not directly raised in the Flint case.

2.

A brief statement of the matter involved is as follows: Complainant is a stockholder of the defendant, The Coney Island and Brooklyn Railroad Company, a corporation owning and operating certain street railroads in the State of New York, and brings this suit in his own behalf (and in behalf of other stockholders similarly situated) against the said corporation and its directors to restrain them from voluntarily making returns and paying the tax imposed by said Act. The Act is alleged to be unconstitutional under Article 1, Section 8, and the Fifth and Tenth Amendments of the Constitution of the United States, and on the further ground that the same constitutes an interference with the sovereign powers, prerogatives and functions of the States, and particularly of the State of New York. The matter in dispute exceeds two thousand dollars.

3.

Defendants filed a general demurrer to the Bill and the cause came on to be heard on Bill and Demurrer in the United States Circuit Court for the Southern District of New York, whence, the demurrer being sustained and the Bill of Complaint dismissed with costs, the complainant prayed an appeal to this court which was duly allowed.

4.

The cause involves issues of public importance affecting most of the corporations in the United States. Among other questions raised in this suit which are not directly raised in the Flint case are the question whether Congress has power to tax franchises granted by a State to a public service

corporation; and whether a larger tax can be imposed upon a corporation whose indebtedness exceeds the amount of its paid-up capital stock than upon other corporations engaged in similar business whose capital stock exceeds their indebtedness.

5.

Unless this appeal is heard and determined before June 30, 1910, the defendants will voluntarily pay the tax in question and appellant will be remediless and will be unable to obtain relief even though this court should later determine that the Act is unconstitutional.

6.

Appellant therefore prays this honorable court that this case may be advanced upon the docket and heard together with the Flint case at as early a date as may be convenient to the court.

Notice of this motion has been served on counsel for the appellees and proof of service filed with the clerk of this court.

Respectfully submitted,

R. V. LINDABURY,
CHARLES W. PIERSON,
Of Counsel for Appellant.

WASHINGTON, *January* 26, 1910.

Office Supreme Court, U. S.
FILED.
JAN 27 1910
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. ~~752~~ 440

FRANCIS L. HINE, APPELLANT,

vs.

HOME LIFE INSURANCE COMPANY ET AL.

MOTION TO ADVANCE.

R. V. LINDABURY,
CHARLES W. PIERSON,
Counsel for Appellant.

(21,978.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 752.

FRANCIS L. HINE, APPELLANT,

vs.

HOME LIFE INSURANCE COMPANY ET AL.,
APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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In this cause the constitutionality of a law of the United States (the so-called Corporation Tax Act, being Section 38 of the Act approved August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes") is drawn in question. The constitutionality of the same law is involved in *Flint vs. The Stone Tracy Company et al.*, No. 747, in which a motion to advance was made January 24, 1910. As will be hereinafter shown, this cause raises questions touch-

ing the constitutionality of said act which are not directly raised in the Flint case.

2.

A brief statement of the matter involved is as follows: Complainant is a stockholder and policy holder of Home Life Insurance Company, a New York corporation, and brings this suit in his own behalf (and in behalf of other stockholders and policy holders similarly situated) against the said corporation and its directors to restrain them from voluntarily making returns and paying the tax imposed by said Act. The Act is alleged to be unconstitutional under Article 1, Section 8, and the Fifth and Tenth Amendments of the Constitution of the United States, and on the further ground that the same constitutes an interference with the sovereign powers, prerogatives and functions of the States, and particularly of the State of New York. The matter in dispute exceeds two thousand dollars.

3.

Defendants filed a general demurrer to the Bill and the cause came on to be heard on Bill and Demurrer in the United States Circuit Court for the Southern District of New York, whence, the demurrer being sustained and the Bill of Complaint dismissed with costs, the complainant prayed an appeal to this court, which was duly allowed.

4.

The cause involves issues of public importance affecting most of the corporations in the United States. Among other questions raised in this suit which are not directly raised in the Flint case are the questions whether Congress has power to impose a tax of the character provided for in said Act upon insurance companies, excluding therefrom fraternal beneficiary societies, orders, or associations operating under the lodge system; and whether Congress can impose such

a tax upon life insurance companies measured in part by their net income derived from investments in the stocks and bonds of other corporations, and in particular from investments in the stocks and bonds of the State of their creation and of the municipalities thereof made pursuant to the requirements of the laws of such State.

5.

Appellant therefore prays this Honorable Court that this case may be advanced upon the docket and heard together with the Flint case at as early a day as may be convenient to the court.

Notice of this motion has been served on counsel for the appellees and proof of service filed with the clerk of this court.

Respectfully submitted.

R. V. LINDABURY,
CHARLES W. PIERSON,
Of Counsel for Appellant.

WASHINGTON, *January* 26, 1910.

Supreme Court of the United States.

OCTOBER TERM, 1909.
NOS. ~~751~~ AND ~~750~~.
609 610

Office Supreme Court U. S.
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MAR 11 1910
JAMES H. McKENNEY,
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WYCKOFF VANDERHOEF,
Appellant,

vs.

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY ET AL.,
Appellees.

FRANCIS L. HINE,
Appellant,

vs.

HOME LIFE INSURANCE COMPANY ET AL.,
Appellees.

BRIEF FOR APPELLANTS.

RICHARD V. LINDABURY,
CHARLES W. PIERSON,
ROBERT LYNN COX,
Of Counsel for Appellants.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1909, NOS. 751 AND 752.

WYCKOFF VANDERHOEF,
Appellant,

v.

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY *et al.*,
Appellees.

FRANCIS L. HINE,
Appellant,

v.

HOME LIFE INSURANCE COMPANY *et al.*,
Appellees.

BRIEF FOR APPELLANTS.

Statement.

These suits come up from the Circuit Court of the United States for the Southern District of New York.

Each case came on to be heard below on bill and general demurrer, and in each a final decree was entered sustaining the demurrer and dismissing the bill; and thereupon an appeal was prayed and allowed direct to this Court on the ground that

the constitutionality of a law of the United States was drawn in question.

As the questions of law involved in the two appeals are similar they will be dealt with in one brief. It will be necessary, however, to state the facts in the two suits separately.

Number 751.

This was a bill filed by Wyckoff VanDerhoef, a citizen of the State of New York, on behalf of himself and all other stockholders of the defendant company similarly situated, against The Coney Island and Brooklyn Railroad Company, a corporation of the State of New York, and its directors. The facts alleged in the bill and admitted by the demurrer may be briefly summarized as follows:

The defendant corporation is a street railway company organized under the laws of the State of New York and owning and operating various street railroads situated within said State and upon the public streets thereof. Its right to construct and operate its railroads in the public streets has been conferred by various special acts of the Legislature of the State of New York. Under the laws of said State it is authorized, by reason of the public nature of its business, to exercise the right of eminent domain, and substantial portions of the land now occupied and used by its railroads were acquired by it in condemnation proceedings (Record, fols. 2-4).

The Capital Stock of said corporation consists of $2,983,900, divided into shares of the par value of $100 each. Said corporation has a bonded indebtedness of $3,500,000 and other indebtedness in excess of $200,000. Its net income from all

sources during the year ending December 31, 1909, amounted to more than $205,000, after making all deductions of the character provided for in the Corporation Tax Act (Sec. 38 of the Act of Congress, approved August 5, 1909, entitled "An Act to provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes") (fols. 4-5).

The appellant is, and for a number of years has been, the owner and registered holder of ten shares of the said corporation's capital stock, which shares are of large value. The capital stock of said corporation is divided among a large number of different persons, and this suit is for an object common to all (fol. 6). The said corporation and its directors have announced their intention voluntarily to comply with the provisions of the Corporation Tax Act, by making and filing the return and paying the tax therein provided for (fols. 6-7). Appellant has requested the corporation and its directors in writing to refrain from voluntarily making the return and paying the tax, and they have refused to comply with his request, asserting as a reason that such compliance would subject the corporation to litigation with the United States and the risk of incurring penalties and of clouding the title to its real estate (fols. 10-11, 16-17). The tax which the defendant corporation would have to pay upon its net income for the year ending December 31, 1909, under the provisions of said Act, would exceed the sum of $2,000 (fol. 7). The bill charges that the provisions of the said Act imposing said tax are unconstitutional upon various grounds (fols. 7-10). As the grounds relied upon will be hereinafter stated and argued, it is unnecessary to set them forth here.

The bill further alleges that if the defendant corporation and its directors pay the tax, as they have declared their intention to do, they will thereby diminish the assets of the company and lessen the value of its stock and the dividends thereon, and that voluntary compliance with the provisions of the Act will expose the Company to the risk of a multiplicity of suits which would work irreparable injury to the business of the Company and involve it and its stockholders, including appellant, in irreparable loss (fol. 11). The bill further alleges that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000, and arises under the Constitution and laws of the United States, and that appellant and the other stockholders of the defendant corporation have no adequate remedy at law in the premises (fol. 12).

The prayer of the bill is that the taxing provisions of the said Act be adjudged unconstitutional, null and void, that the defendants be restrained from voluntarily making the returns and paying the tax therein provided for, and for general relief (fol. 12).

Number 752.

This was a bill filed by Francis L. Hine, a citizen of the State of New York, on behalf of himself and all other stockholders and policyholders of the defendant company similarly situated, against Home Life Insurance Company, a corporation of the State of New York, and its directors. The facts alleged in the bill and admitted by the demurrer may be briefly summarized as follows:

The defendant is a corporation organized under the laws of the State of New York and engaged

in the business of insuring lives. Its capital stock consists of $125,000 divided into 1,250 shares of the par value of $100 each, and its accumulated profits and other assets exceed in value the sum of $22,000,000. By the laws of the State of New York the Company is required to invest its capital to the extent of $100,000 in the stocks or bonds of the United States or of the State of New York or of the municipalities thereof, or in bonds and mortgages on improved unincumbered property in said State, and is authorized to invest the residue of its capital and its surplus moneys and funds in the securities aforesaid or in certain other specified kinds of real and personal property. The greater part of its assets are actually invested in real estate, United States Government bonds, bonds of the State of New York, corporate stocks of the City of New York, bonds of other municipal corporations within the United States, bonds and stocks of other solvent institutions incorporated under the laws of the United States or of one or more of the States, and real estate bonds and mortgages. (Record, fols. 2-3.) Included in its assets invested as aforesaid are $1,112,000 and upwards of "unassigned funds," said unassigned funds being undivided profits (fol. 3). Its net income during the year ending December 31, 1909, amounted to a sum in excess of $450,000 after making all deductions of the character provided for in the Corporation Tax Act (fol. 4). Appellant is, and for a number of years has been, the owner and registered holder of ten shares of the said Company's capital stock of a value exceeding $2,000. By the charter of said Company it is provided that the holders of its capital stock shall receive semi-annually dividends of six per cent., but shall not

further share in the profits of the Company except as they may be entitled as policyholders. The capital stock of the Company is divided among a large number of different persons, and this suit is for an object common to them all. The charter of the Company further provides that the insurance business of the Company shall be conducted on the principle of giving to policyholders an interest in the profits of the Company (unless otherwise agreed between the Company and the insured), and further provides that the net profits of the Company shall be ascertained annually and shall be apportioned to the holders of policies who may be entitled to participate in the profits according to their respective contributions thereto. Appellant is the holder of a $2,500 policy of life insurance issued by said Company in 1891, and under the terms thereof is entitled to participate in the profits of the Company as the same shall be ascertained and apportioned from year to year, according to the provisions of its charter. The policyholders of the Company holding participating policies are very numerous, comprising more than forty-three thousand and representing in the aggregate more than eighty-one million dollars of life insurance, and this suit is for an object common to them all (fols. 5-6). The corporation and its directors have announced their intention to voluntarily comply with the provisions of the Corporation Tax Act by making and filing the return and paying the tax therein provided for (fol. 6). Appellant has requested the corporation and its directors in writing to refrain from voluntarily making the return and paying the tax, and they have refused to comply with his request, asserting as a reason that such compliance would subject

the corporation to litigation with the United States (fols. 10, 16-17). The tax which the corporation would have to pay upon its net income for the year ending December 31, 1909, under the provisions of the Act would exceed the sum of $4,500 (fol. 7). The bill charges that the provisions of the Act are unconstitutional upon various grounds (fols. 7-10). As the grounds relied upon will be hereinafter stated and argued it is unnecessary to set them forth here.

The bill further alleges that if the Company's directors pay the tax as they have declared their intention to do they will thereby diminish the assets of the Company and lessen the funds applicable to the payment of dividends on its capital stock and participating policies, including the stock and policy held by appellant; that it would be impossible to ascertain and measure the amount of damage and loss to appellant resulting therefrom; that said damage would be irreparable and incapable of ascertainment in an action at law (fol. 11); that voluntary compliance with the provisions of the Act will expose the Company to the risk of a multiplicity of suits not only by its shareholders, but also by its numerous policyholders; and that in such suits all the policyholders of the Company, including appellant, would or might be necessary and proper parties by reason of their interest in the net income of the Company, and that such suits would work irreparable injury to the business of the Company and to appellant and the Company's other stockholders and participating policyholders (fol. 12). The bill further alleges that this is a suit of a civil nature in equity and that the matter in dispute exceeds, exclusive of interest and costs, the sum

of Two thousand dollars, and arises under the Constitution and laws of the United States (fol. 12). The prayer of the bill is that it be adjudged that the taxing provisions of the said Act are unconstitutional; that the defendants be restrained from voluntarily making the returns and paying the tax therein provided for; that the defendant Company be required to specifically perform the terms of its policy contracts with appellant and other policyholders similarly situated, by apportioning to him and them their respective shares of the net income of the Company without subtraction or diminution by reason of anything contained in the Corporation Tax Act, and for general relief (fols. 12-13).

THE CORPORATION TAX LAW.

The Act in question forms Section 38 of the new tariff law, being "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes," approved August 5, 1909. The provisions of the Act material to the present discussion are as follows:

> SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business

by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and neces-

sary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed. * * *

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thou-

sand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury shall prescribe. * * *

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon. * * * All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June. * * *

Sixth. When the assessment shall be made, as provided in this section, the re-

turns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

SPECIFICATION OF ERRORS RELIED UPON.

I.

That the Court below erred in sustaining the demurrer and dismissing the bills for want of equity.

Record in No. 751, fol. 28, Assignments of Error X, XI and XII;

Record in No. 752, fols. 27, 28, Assignments of Error XI, XII and XIII.

II.

That the Court erred in not holding that Section 38 of the Act is void because as to State corporations it constitutes an interference with sovereign powers and functions of the States not surrendered to the general government and expressly reserved to the States by the 10th Amendment.

Record in No. 751, fol. 25, Assignments of Error I, II and III.

Record in No. 752, fols. 23, 24, Assignments of Error I, II and III.

III.

That the Court erred in not holding that the taxes imposed or some portions thereof are direct taxes and that the provisions imposing the same are void because the taxes are not apportioned among the States.

Record in No. 751, fol. 26, Assignment of Errors IV;
Record in No. 752, fol. 25, Assignment of Errors IV.

IV.

That the Court erred in not holding that Congress could not tax the stocks and bonds of States and municipalities thereof, and in not sustaining the bill to that extent.

Record in No. 752, fol. 25, Assignment of Errors V.

V.

That the Court erred in not holding that said section of said Act is unconstitutional because the tax it imposes is arbitrary, non-uniform and unequal, and makes illegal discriminations and exemptions.

Record in No. 751, fols. 26, 27, Assignments of Error V, VI, VII and VIII.
Record in No. 752, fols. 25-27, Assignments of Error VI, VII, VIII and IX.

VI.

That the Court erred in not holding that the tax is unconstitutional so far as the same is imposed on the franchises or business of State railroads and other public service corporations.

Record in No. 751, fol. 25, Assignments of Error II and III.

PRELIMINARY POINT.

Equity has jurisdiction, at the instance of a stockholder, to restrain the threatened breach of trust on the part of directors in voluntarily paying and not resisting the collection of an unconstitutional tax.

Pollock *v.* Farmers Loan & Trust Co., 157 U. S., 429, 553;
Dodge *v.* Woolsey, 18 How., 331;
Hawes *v.* Oakland, 104 U. S., 450.

It is unnecessary to argue this point at length in view of the careful consideration which the question received in the Income Tax Cases (Pollock *v.* Farmers Loan & Trust Co.). These suits are similar in nature and procedure to the Pollock case, which is believed to have settled the jurisdictional questions involved.

POINT I.

The tax is not an excise tax upon business or occupation, but is either

(a) A corporate franchise tax, or

(b) An income tax.

The first thing to be determined is the exact nature of the tax. The Act describes it as "a special excise tax with respect to the carrying on or doing

business" by the corporations, joint stock companies and insurance companies on which it is imposed.

These words were taken almost verbatim from the opinion of this Court in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397, and it is matter of public record, in the Senate debates on the subject, that the Spreckels case was supposed to afford a precedent for the tax sought to be imposed.

See *e. g.* Congressional Record for June 16, 1909, p. 3450; id. for July 1, 1909, pp. 4069, 4077-8, 4079.

In the Spreckels case a tax had been imposed on a corporation carrying on the business of refining sugar, under an Act of Congress providing

> "That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars."
>
> (Act of June 13, 1898, Section 27.)

This Court sustained the tax as an excise tax on business or occupation, saying (p. 411):

> "Clearly the tax is not imposed upon gross annual receipts as property; but only *in respect of the carrying on or doing the business* of refining sugar."

It seems to have been assumed when these words were inserted in the present Act that they carried with them the nature of the tax concerning which they were spoken. We believe it can readily be demonstrated that this assumption was erroneous, that the present tax differs fundamentally in its nature from the tax involved in the *Spreckels* case, and that it is not a tax on business or occupation.

1st. The tax is imposed only on artificial persons. Individuals and ordinary partnerships engaged in similar businesses are not taxed. The Act construed in the *Spreckels* case, on the contrary, applied to "every person, firm, corporation or company" carrying on the business specified.

How can a tax imposed on A and B and not on C and D, when all are carrying on the same kind of business, be said to be a tax on business or occupation?

2nd. The tax is measured by a percentage of the net income, not from business carried on, but *from all sources.* In the act construed in the *Spreckels* case, on the contrary, the tax was limited to income received in the particular businesses sought to be taxed. This difference would seem to be decisive against the claim that the tax is to be construed as a tax on the businesses in which the various artificial persons subject to its operation are engaged. The measure adopted does not vary reasonably with the value of such businesses. How can it be said that a tax is upon a business or occupation when it is levied upon a person without regard to the amount of business he does or where he does it, or whether his business is taxable or not and even when he ceases from business altogether provided he is in receipt of an income? The provisions of the Act which

extend the taxation over the entire net income of corporations, only a fraction of whose income is derived from business, and over the entire net income of corporations engaged wholly in foreign business, or not engaged in business at all (provided they happen to have an income from investments), and over the entire net income of corporations engaged in a non-taxable business like the exporting companies, we respectfully submit render it impossible to classify the present tax with occupation or business taxes.

3rd. No kind or kinds of business are specified. The tax falls indiscriminately on the income of all artificial persons (with certain enumerated exceptions not material to the present discussion) doing every conceivable kind of business. In the act construed in the Spreckels case, on the contrary, the tax was limited to certain specific businesses, viz., refining petroleum and refining sugar. The difference is fundamental. An essential distinction between a direct property tax and an excise is that the former is a tax upon property or income generally, imposed merely because of ownership, while an excise tax on business, privileges, acts or commodities, involves the selection of some particular business, privilege, act or commodity, to be taxed.

In *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S., 217, the Court said, speaking of an excise tax (p. 227): "The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue *certain* callings, or to deal in *special* commodities, or to exercise *particular* franchises" (Italics ours).

In *Nicol* v. *Ames,* 173 U. S., 509, the Court said (p. 521):

> "A tax upon the privilege of selling property at the Exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property*" (Italics ours).

This language is quoted with approval in *Fairbank* v. *United States*, 181 U. S., 283, 293.

In *Thomas* v. *United States*, 192 U. S., 363, the Court held that the stamp duty imposed by the War Revenue Act of 1898 on sales of shares of stock in corporations was an excise and not a direct tax. Chief Justice Fuller, speaking for the Court, said (pp. 370-371):

> "There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of *certain* commodities, privileges, *particular* business transactions, vocations, occupations and the like. * * * The sale of stocks is a *particular* business transaction" (Italics ours).

In *Patton* v. *Brady*, 184 U. S., 608, the Court held that a tax on a particular article (viz, manufactured tobacco), imposed at a period intermediate the commencement of manufacture and the final consumption of the article, was an excise. Justice Brewer, discussing the nature of an excise as distinguished from a direct tax, said (pp. 617-18):

> "Cooley, in his work on Taxation, page 3, defines it as 'an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue *certain* trades, or to deal in *certain* commodities.' Bouvier and

> Black, respectively, in their dictionaries, give the same definition. If we turn to the general dictionaries, Webster's International calls it 'an inland duty or impost, operating as an indirect tax on the consumer, levied upon *certain specified* articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue *certain* trades and deal in *certain* commodities.' * * * Counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax* cases, but, as we have seen, it is not a tax upon property as such, but upon *certain kinds* of property, having reference to their origin and their intended use." (Italics ours).

In *Knowlton* v. *Moore*, 178 U. S., 41, Justice White said (p. 47):

> "They (*i. e.*, inheritance and legacy taxes in France) are included officially under the general denomination of indirect taxes for the reason that all inheritance and legacy taxes are considered as levied on the 'occasion of *a particular isolated* act'." (Italics ours)

and on page 82 he refers to the decision in the Income Tax Cases, as follows:

> "Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the Court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax

> imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned."

It must be concluded, therefore, that a tax upon all persons whatever, irrespective of their callings, measured by a percentage upon their income from all sources, would not be an excise tax on business, but would be essentially an income tax. If the tax be confined to artificial persons, excluding individuals and ordinary partnerships (as in the Act under consideration), it does not thereby become an excise tax upon business. The limitation which converts an income or property tax into an excise tax must be upon the *property* taxed, not upon the *owner* thereof. Such a tax limited to artificial persons either remains what it was before—an income tax—or else becomes a franchise tax. Calling it something else cannot alter its essential nature.

4th. That the tax cannot properly be construed as a tax on business or occupation is also shown by other features of the Act: e. g., it extends to corporations and joint stock associations engaged in the business of exporting, and requires them to pay a tax upon the net income derived from such business. Of course, Congress cannot tax the business of exporting as a business (Constitution, Art. I, Sec. 9, subdiv. 5; Brown *v.* Maryland, 12 Wheat., 419; Fairbank *v.* United States, 181 U. S., 283) and the inclusion of such a provision in the present Act adds to the difficulty of classifying the tax imposed with business or occupation taxes. Again, the tax

is imposed upon corporations and joint stock companies wheresoever they are engaged in business, and requires them to pay a tax upon income derived, not merely from business done in this country, but also from that done in foreign countries. This follows from the generality of the language employed and the provision for deducting taxes paid by such corporations and joint stock companies in foreign countries "as a condition to carrying on business therein." It can hardly be claimed that Congress has power to tax a business as such when carried on beyond the jurisdiction of the United States. As said by Justice Field in *State Tax on Foreign-Held Bonds,* 15 Wall., 300, 319:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

If Congress cannot tax foreign business, this feature of the present tax also stands in the way of its classification with occupation and business taxes.

It is unnecessary to argue that the nature of the tax does not depend on what Congress has seen fit to label it.

As was pointed out by the Court in the Pollock case (157 U. S., pp. 580-583): "The name of the tax is unimportant;" * * * "it is the substance and not the form which controls;" * * * the limitations of the Constitution cannot be "frittered away" by calling a tax indirect when it is in fact direct. And again in *Galveston, &c. Ry. Co.* v

Texas, 210 U. S., 217, 227, the Court denied that "The legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

POINT II.

If the tax be construed as a franchise tax, it constitutes, so far as state corporations are concerned, an interference with sovereign powers and functions of the states not surrendered to the general government and expressly reserved to the states by the Tenth Amendment.

As already shown (Point I, *supra*) the tax is not a tax on business or occupation. It follows that (if not an income tax) it is to be construed as a franchise tax, imposed in the case of domestic corporations and joint stock associations upon the franchise to do business in their respective capacities, and in the case of foreign corporations and associations on the privilege of doing business in their respective capacities within the territorial jurisdiction.

Home Ins. Co. *v.* New York, 134 U. S., 594;

Society for Savings *v.* Coite, 6 Wall., 594;

Provident Institution *v.* Mass., *ibid.*,, 611;

Maine *v.* Grand Trunk Ry. Co., 142 U. S., 217;
Horn Silver Mining Co. *v.* New York, 143 U. S., 305;
People *ex rel. v.* Knight, 174 N. Y., 475.

In the *Home Insurance Company* case this Court held (as stated in the headnote) that

> "A tax which is imposed by a State statute upon the 'corporate franchise or business' of all corporations incorporated under any law of the State or of any other State or country, and doing business within the State, and which is measured by the extent of the dividends of the corporation in the current year, is a tax upon the right or privilege to be a corporation and to do business within the State in a corporate capacity."

In *Society for Savings* v. *Coite* and *Provident Institution* v. *Mass.* (*supra*) it was held that a tax on savings banks measured by a percentage upon their deposits was a corporate franchise tax.

In *Maine* v. *Grand Trunk Ry. Co.* (*supra*) it was held that a tax on a foreign corporation measured by a proportion of its gross receipts within the State was "an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State" (p. 227). *Horn Silver Mining Co.* v. *New York* (*supra*) is to the same general effect.

The fact that the tax is laid on joint stock companies as well as on corporations does not necessarily indicate that it is not a franchise tax. Apparently the only joint stock companies taxed are

such as have a statutory origin and enjoy franchises from the State. The language of the act is:

> "Every corporation, joint stock company or association * * * and every insurance company * * * *organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or * * * under the laws of any foreign country.*"

The words which we have italicized apparently qualify the words "joint stock company or association" as well as the words "corporation" and "insurance company", and seem to exclude from the operation of the act such joint companies, if any there now be, as are merely common law partnerships. That many joint stock associations are artificial entities and possess and exercise legislative franchises substantially identical with those possessed and exercised by corporations is well established. (*Liverpool Insurance Co.* vs. *Massachusetts*, 10 Wall., 566; *People* vs. *Wemple*, 117 N. Y., 136; *Hibbs* vs. *Brown*, 190 N. Y., 167; *Adams Ex. Co.* vs. *State*, 55 Ohio St., 69; *Briar Hill Coal & Iron Co.* vs. *Atlas Works*, 146 Pa., 290; *Oak Ridge Coal Co.* vs. *Rogers*, 108 Pa., 147; *Attorney General* vs. *Mercantile Marine Insurance Co.*, 121 Mass., 524.)

Assuming then that this is the real nature of the tax, *i. e.*, that it is a tax upon franchises or the privilege of doing business in corporate or joint stock form is it within the power of Congress to impose?

Unquestionably Congress may tax corporations organized under Federal law upon their franchises; any sovereignty may so tax its creatures; but how about corporations chartered by the States and do-

ing only an intra-state business? A State confers on John Doe and his associates the privilege or franchise of doing business in a corporate capacity. Can Congress impose a tax on the exercise of that privilege or franchise? The power to tax involves the power to destroy, and the power to destroy may defeat and render useless the power to create. (*McCulloch* v. *Maryland*, 4 Wheaton, 316.) If Congress can impose a tax of one per cent., it can impose a tax of ten per cent. or fifty per cent., and thus impair or destroy altogether the value of corporate charters for business purposes. Does Congress possess such a power?

The right to grant corporate charters for ordinary business purposes is an attribute of sovereignty belonging to the States, not to the General Government. The United States is a Government of enumerated powers. The Constitution nowhere expressly confers upon Congress the right to grant corporate charters, and it is well settled that this right exists only in the limited class of cases where the granting of charters becomes incidental to some power expressly conferred. On the other hand, the right of the separate States to grant charters of incorporation is unquestionable. They had that right before the Union was formed and never surrendered it. In the Constitutional Convention of 1787, Mr. Madison twice moved that Congress be given power to grant charters of incorporation in certain cases, but the motions were not adopted.

(See Elliot's Debates on the Federal Constitution, 2nd Ed., Vol. V., pp. 440, 543.)

This Court has frequently recognized the plenary power of the States to grant and control the exer-

cise of corporate franchises (See *e. g., Home Ins. Co.* v. *New York,* 134 U. S., 594, 600-601; *Horn Silver Mining Co.* v. *New York,* 143 *id.* 305, 313), and long ago said of it: *"This power is incident to sovereignty."* (*Briscoe* v. *Bank of Kentucky,* 11 Peters, 257, 317.)

The power to grant the franchise to do business in a corporate capacity being therefore inherent in the sovereignty of the States, it follows that a tax imposed by Congress upon the exercise of the franchise will constitute an interference with the power.

This court has said, and many times repeated in substance, that the National Government "cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action."

> Railroad Company *v.* Peniston, 18 Wall., 5, 30.

Thus it has been held that Congress cannot tax the obligations of indebtedness of a State (*Mercantile Bank* v. *New York,* 121 U. S. 138, 162); that Congress cannot tax a municipal corporation (being a portion of the sovereign power of the State) upon its municipal revenues (*U. S.* v. *Railroad Co.,* 17 Wall., 322); that Congress cannot impose a tax upon the salary of a judicial officer of a State (*Collector* v. *Day,* 11 Wall., 113); that Congress cannot tax a bond given in pursuance of a State law to secure a liquor license (*Ambrosini* v. *United States,* 187 U. S., 1). A writer of high authority on Constitutional Law has said:

> "There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure exist-

> ence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation is quite as much beyond the power of the National Legislature as if the interference were direct and extreme."
>
> Cooley, Constitutional Limitations, 7th Ed., p. 684 (quoting from *Fifield* v. *Close*, 15 Mich., 505, 509.)

In his dissenting opinion in the *Peniston* case *supra* (quoted with approval by the present Chief Justice in 162 U. S., p. 122), Justice Bradley said:

> "It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the General Government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence."

The precise question whether Congress can tax the corporate franchises of a State corporation has not been directly brought before this Court, because Congress has not heretofore attempted anything of the sort. The converse of the question, *i. e.*, whether a State can tax corporate franchises granted by Congress, has, however, been directly passed upon. In *California* v. *Central Pacific R. R. Co.*, 127 U. S., 1, the question was squarely presented. That was an action by the State of California to recover a tax assessed upon all the property and franchises of the defendant. Some of the defendant's franchises had been granted by Congress. The Court held the assessment void because these franchises were included. Justice Bradley, speaking for a unanimous court, discusses the nature and origin of franchises, concluding that a

franchise is "a right, privilege or power of public concern" existing and exercised by legislative authority. After enumerating various kinds of franchises, the opinion continues (p. 41):

> "No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise.* * * * In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* v. *Maryland*, 'The power to tax involves the power to destroy.' * * * It seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

This case is squarely in point, unless the rule there enunciated does not work both ways,—unless Congress can tax the franchises of a State railroad company but a State cannot tax the similar franchises of a railroad company chartered by Congress. Such a view would run counter to the trend of decisions in this court during its entire existence. In the early case of *Chisholm* v. *Georgia*, 2 Dall., 419, Justice Iredell said (p. 435):

> "Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider

> to be as completely sovereign as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered. Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them; of course the part not surrendered must remain as it did before."

In *The Collector* v. *Day*, 11 Wall., 113, the Court said (p. 124):

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved," are as independent of the general government as that government within its sphere is independent of the States."

and again (p. 126):

> "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality."

These views have been reiterated time and again in later cases. Moreover, they have been consistently applied. In *Weston* v. *City of Charleston*, 2 Peters, 449, it was established that a State could not tax the obligations of the United States, because such a tax operated upon the power of the

Federal government to borrow money. In *Mercantile Bank* v. *New York*, 121 U. S., 138, 162, the converse was held, *i. e.* that Congress could not tax the obligations of a State for the same reason. In *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, it was held that a State could not tax the emoluments of an official of the United States. In *Collector* v. *Day*, 11 Wall., 113, the converse was held. As a State cannot impose a tax on the property or revenues of the United States (*Van Brocklin* v. *Tennessee*, 117 U. S., 151), so Congress cannot tax the property or revenues of a State or a municipality thereof (*United States* v. *Railroad Company*, 17 Wall., 322).

It will doubtless be urged that the tax in *California* v. *Central Pacific Railroad* was unconstitutional, not merely because it was imposed upon a franchise granted by the General Government, but because the Railroad Company was a governmental agency and performed governmental functions. But the same thing is true of a State public service corporation (like the Coney Island and Brooklyn Railroad Company, defendant in No. 751). To provide means of transit and intercommunication for its citizens and troops has commonly been regarded as a governmental function of a State. In the exercise of that function Rome built her roads and New York her Erie canal. A State may exercise that function without private co-operation, or it may (and in this age of railways usually does) exercise it by conferring appropriate corporate franchises on individuals, endowing the corporation so formed with the governmental power of eminent domain, and leaving it to do the rest, subject to State supervision.

We submit, however, that the true test (and the test applied in the case cited) is found in *the nature*

of the function performed by the State in chartering the corporation, not in the nature of the function performed by the corporation after it is chartered. In the words of the Court, "The power conferred emanates from and is a portion of, the power of the government that confers it." The granting of a charter to an insurance company or other private corporation is as much an emanation of governmental power as is the granting of a charter to a national bank, and the possession or exercise of either is the possession or exercise of governmental power. In other words, *the exercise of the power to grant a charter of incorporation is always a strictly governmental function, whether the corporation so chartered is expected to act as a governmental agency or not.* It is a function peculiar to government or sovereignty and incapable of exercise by any one else. It is a branch of, or incidental to the law-making power (1 Morawetz, Corporations, Sec. 8). A tax, therefore, on the franchise, or the exercise of the franchise, constitutes an interference with the exercise of a governmental function, irrespective of the character of the corporation which pays the tax.

The rule forbidding taxation by the States of patent rights or copyrights granted by the General Government (*People ex rel Edison &c. Co.* v. *Assessors,* 156 N. Y., 417; *People ex rel* v. *Roberts,* 159 N. Y., 70; *In Re Sheffield,* 64 Fed. Rep., 833; *Commonwealth* v. *Westinghouse &c. Co.,* 151 Pa., 265; *Webber* v. *Virginia,* 103 U. S., 344) would seem to rest on the same reason, though it has not always been clearly recognized by the State Courts. The granting of a patent is an emanation of governmental power and the exercise of a governmental function, and therefore immune from State inter-

ference, irrespective of the nature or intended use of the patent itself.

The principle for which we are contending is well summarized in

> Wisconsin Railroad Co. *v.* Price County, 133 U. S., 496, 504,

where, speaking of the lack of power in a State to tax property of the United States, the Court says that the exemption

> "is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency."

That corporate franchises granted by a State are beyond the taxing power of Congress follows from another line of reasoning. Chief Justice Marshall, in words often repeated by this Court, defined the limitations of the taxing power as follows: (*Weston* v. *City Council of Charleston*, 2 Peters 449, 467).

> "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.
>
> The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission."

Applying the test here proposed,—can it be contended for a moment that the corporate franchise of a state corporation exists "by authority" of the General Government, or is "introduced by its permission"? Congress did not grant the franchise, and cannot amend or revoke it, or regulate

its exercise when not employed in inter-state commerce. The Federal Government cannot maintain *quo warranto* proceedings to forfeit a state franchise or oust the possessor thereof. All these powers belong exclusively to the State. Congress undoubtedly can impose on artificial persons the same taxes that it can impose on natural persons. It can tax the property and business of A. B. C. & Co., a partnership engaged in the business of sugar refining, and its power to impose those taxes is not diminished if A. B. & C. choose to incorporate as the A. B. C. Company. A tax on the corporate franchise, however, goes further and seeks to reach something new,—something which in the case of individuals has no existence at all,—which comes into being only by the exercise of the sovereign power of a State,—which "emanates from and is a portion of, the power of the government that confers it," (127 U. S. 41), and exists during the pleasure of that government. In other words such a tax seeks to reach the corporate life, a thing which Congress did not give and cannot take away, unless by the destructive power of taxation.

We proceed to examine briefly certain cases asserted to be at variance with the views above expressed.

Pacific Insurance Company v. *Soule,* 7 Wall. 433, is claimed to be an authority for the tax on insurance companies. That case upheld a Federal tax on an insurance company measured by a percentage of its premium receipts. The tax was described as "upon the *business* of an insurance company" and was sustained on the ground that it was an excise or duty and not a direct tax. That it was a tax on business, whereas the present tax

is not, will be clear from a brief comparison of the two Acts. In the *Soule* case the Act applied not only to "every insurance company" but also to "every association or individual engaged in the business of insurance." (13 U. S. Statutes at Large 276.) The present Act applies only to artificial persons. Moreover, large classes of artificial persons are expressly exempted. For example, fraternal beneficiary societies, orders and associations operating under the lodge system, which corporations, as is well known, do a very large part of the insurance business of the country. In the *Soule* case the income taxed was income received from the insurance business. The present Act taxes income "from all sources." In the *Soule* case a particular business was selected for taxation. The present Act taxes all artificial persons indiscriminately, regardless of the kind of business transacted. It is clear, therefore (for the reasons discussed in Point I *supra*), that the tax involved in the *Soule* case was of a different nature from the tax now before the Court and that the case affords no precedent for this tax.

Veazie Bank v. *Fenno*, 8 Wall., 533 (which upheld the statute taxing out of existence the circulation of the State banks), has been asserted to sustain the right of Congress to levy a tax upon a franchise or privilege granted by a State. It is true that in that case the eminent counsel for the bank (Messrs. Reverdy Johnson and Caleb Cushing) argued unsuccessfully "that the act imposing the tax impaired a franchise granted by the State, and that Congress had no power to pass any law which could do that" (See 8 Wall., p. 535), and that two justices dissented on that ground. The

conclusive answer to this argument was, however, that the power of the States to grant the particular right or privilege in question was subordinate to powers expressly conferred on Congress by the Constitution; that Congress was given power under the Constitution to provide a currency for the whole country, and the Act in question was legislation appropriate to that end. The case does not hold that Congress has any general power to tax franchises or privileges granted by a State. The decision was expressly put on other grounds, and the remarks of the Chief Justice on the taxation of franchises (found at p. 547) are merely dicta.

Knowlton v. *Moore*, 178 U. S., 41 (the Federal Inheritance Tax case), has also been asserted to be an authority for the right of Congress to tax a privilege granted by a State. It is true that in that case the Court discussed and overruled the contention that Congress cannot impose an inheritance tax because inheritances are regulated by State law. The Court, however, concluded, after an exhaustive examination of the subject, that the tax did not fall on any privilege from the State. An inheritance tax falls on the transmission or transfer. As Mr. Justice White, writing for the Court, said (p. 59):

> "The fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."

The transmission or transfer is not a privilege granted by a State, but necessarily follows and results from the fact of death. A man dies and his property perforce passes from him. That is the transmission. The State does not originate it, but merely prescribes the channels in which it shall flow. This right of regulation is not the subject of the tax. The tax would be due, like the tax upheld in the *License Tax Cases* (5 Wall., 462), if there was no regulation whatever.

South Carolina v. *United States*, 199 U. S., 437 (the South Carolina Dispensary case), has been asserted to be an authority for the right of Congress to tax the exercise of powers or functions by a State. The powers and functions in question, however, were not of a governmental character. Moreover, the case does not touch at all the question of the right of Congress to tax franchises granted by a State. The tax which was upheld was a tax upon the business of selling liquor. The right to sell liquor is not a franchise granted by a State any more than the right to sell boots, though the State in the exercise of the police power may regulate the business or even take it over altogether and conduct it through agents of the State. South Carolina had done this, and the question in the case was as to the right to tax a State agency. The question of the right to tax a franchise or privilege from the State was not involved. The Court held that the State could not, by taking over a private business, deprive the Federal Government of a right of taxation which had always existed, pointing out that otherwise "it would be within the competency of the States practically to destroy the efficiency of the National Government."

This Court in both the cases last cited lays much

stress on the historical argument, *i. e.*, that the power of Congress to impose the taxes in question had been conceded from the foundation of the Government and frequently exercised. The tax now before the Court, on the contrary, is an innovation of the year 1909.

We are not contending here (as were appellants in the Inheritance Tax case and the South Carolina Dispensary case), in favor of any right or power of a State to narrow the field of Federal taxation or withdraw from the taxing power of Congress any subject matter over which that power has ever been exercised. On the contrary we are resisting an attempted encroachment by Congress on an entirely new field, created by and heretofore reserved exclusively to the separate states. Congress can tax a property and business owned by individuals. It can tax the same property and business when owned by a corporation. The act of the State in clothing the individuals with corporate franchises withdraws no source of Federal revenue. Does it on the contrary create a new subject matter for taxation by the General Government? That is the proposition involved in the claim of a right in Congress to tax corporate franchises granted by a State. We submit that there is no ground for such a claim, either in reason or in precedent.

The Tax Cannot Be Sustained as a Tax on Franchises as Property.

It may be urged, in reliance on certain dicta in *Veazie Bank* v. *Fenno*, 8 Wall., 533, 547, that the tax is imposed on franchises, not as privileges from the State, but as *property*.

We do not think the Act is open to that construction. There is no provision for ascertaining the value of the franchises as property, either by appraisement or otherwise.

Even if the Act were to be so construed, however, appellees would be in no better position, because:

(*a*) The fact that a tax is on property does not render it constitutional if it nevertheless involves an interference with sovereign powers or instrumentalities of a State. The taxes involved in *The Collector* v. *Day*, 11 Wall., 113, and *U. S.* v. *Railroad Co.*, 17 Wall., 322, were property taxes, but that fact did not save them.

(*b*) If the tax is on franchises as property it is a tax imposed on real or personal property, and is void under Article I, Sections 2 and 9, of the Constitution, as being a direct tax not apportioned according to population.

Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.
On Rehearing, 158 U. S., 601.

The Principle Menaced by the Claim of a Right in Congress To Tax the Franchises of State Corporations, and the Practical Consequences if Such a Claim Be Upheld.

The amount of the present tax is not large when compared with the aggregate assets of the artificial persons on which it is laid. The principle involved, however, is fundamental and vital. It touches the right of each State under the compact evidenced by the Federal Constitution to manage its internal affairs free from compulsion or interference by the other States.

In some parts of the country the anti-corporation feeling runs high. Many men, both in Congress and out, if given their way would tax the larger corporations out of existence. If this Act is upheld in principle the way is open whenever these men can secure a majority in Congress. An increase in the tax rate is all that would be necessary. Make the rate ten per cent. or twenty per cent. instead of one per cent. and the thing is accomplished.

New York may deem it good policy to encourage the carrying on of industry in a corporate form. Texas may take a different view and conclude that the solution of the Trust problem lies in suppressing certain classes of corporations altogether. If the principle of this Act is upheld it will be within the power of Texas and her associates in Congress to impose their views on New York and make it impossible for her domestic industries to be carried on profitably in a corporate form. The possibility of so impressing the will of one State or group of States upon another State with respect to her internal affairs is the very thing which the founders of the Government sought most carefully to avoid. Had it been supposed that the grant of taxing powers to the General Government involved such a curtailment of State independence it is doubtful, to say the least, whether enough States would have consented to ratify the Constitution.

POINT III.

If the tax be construed as an income tax it is unconstitutional (a) because imposed upon income from real estate and personal property, and therefore a direct tax not apportioned among the states according to population; and (b) because imposed upon income from state and municipal securities and therefore a burden on the borrowing power of the states. As these are essential and inseparable parts of the taxing scheme, the tax must fall as a whole.

The Act provides

> "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company * * * shall be subject to pay annually a [*special excise*] tax [*with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company,*] equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," etc.

Strike from the Act the words which we have bracketed and it becomes clearly an income tax (if it is not a corporate franchise tax). Can the addition of those words be said to change the nature of the tax? They are merely words of description or characterization, in no wise affecting any of the

substantive features of the tax. And as already seen (Point I *supra*), the nature of the tax depends upon its substantive features—not on what the legislature has seen fit to call it. "It is the substance and not the form which controls." (157 U. S., 581.)

It will be illuminating to compare the tax with the corresponding features of the act declared unconstitutional in the Pollock case. Section 32 of that act (28 Stat., 509, 556, c. 349,) provided

> "That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all * * * corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships."

Comparing the provisions just quoted with the Act now under consideration it will be seen that while they differ in phraseology the only difference in substance is that the Act of 1894 imposed a tax of two per centum "on the net profits or income" of corporations, while the present tax is "equivalent to one per centum upon the entire net income over and above five thousand dollars." The fatal characteristic of the Act of 1894 as found in the Pollock case was that it imposed without apportionment a tax on persons "solely because of their general ownership of property." (Knowlton *vs.* Moore, 178 U. S., 41, 82.) That characteristic pervades every feature of the present Act and is intensified by the addition of the word "entire" as above.

We assume that if this court construes the tax as an income tax it will feel itself constrained to follow the decision in the Income Tax cases. (Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429; 158 U. S., 601.) We deem it unnecessary, therefore, to discuss the considerations on which that decision was based. No case ever received more thorough or exhaustive consideration. It has been frequently cited as authority in later decisions of this court and has been acquiesced in by the country at large. The method of providing for a valid Federal income tax which it pointed out (viz.: by constitutional amendment) is actually being pursued. Such a constitutional amendment has been proposed by Congress (See Joint Resolution of Congress, p. 185 of Statutes of 1909) and is now before the State legislatures for ratification. Under these circumstances the questions involved in the Income Tax cases may well be considered as definitely and finally settled.

It only remains to point out that the corporations involved in the cases in which this brief is filed (Nos. 751 and 752) derive income from sources which bring them squarely within the decision in the Pollock case. The Home Life Insurance Company (Appellee in No. 752) has many millions of dollars invested in real and personal property and in Government, State and municipal securities, and derives a large income from such investments.

See Record, p. 2, fol. 3.

The Coney Island and Brooklyn Railroad Company (Appellee in No. 751) derives substantially its entire income from the use of real and personal

property, and the exercise of franchises which by the laws of the State of New York are defined to be real estate.

See Record, p. 5, fols. 9, 10, Laws of New York 1909, Chap. 62, Sec. 2.

That the inclusion of these objects in the taxing scheme of 1894 rendered the whole scheme void was one of the points decided in the Pollock case. The court considered that the scheme must be regarded as a whole and that the provision for a tax on the income from real and personal property formed a vital part of it. The same reasoning, we submit, applies to the present Act. This Act contemplates a tax upon the entire net income of corporations and joint stock associations derived from all sources. The amount of income derived by corporations—notably insurance companies—from real estate and invested personal property is very large, and the taxation of this income is as vital a part of the present scheme as it was of that of 1894. If this were deducted a large part of the anticipated revenue would be eliminated and the tax would cease to be upon the entire net income as contemplated by Congress. A tax upon net income received from all sources except from invested capital and surplus is very different in operation and effect from a tax upon entire net income from all sources.

POINT IV.

The tax ordained by the Act in question is non-uniform, arbitrary and unequal, and if imposed and enforced would deprive the corporations and joint stock associations against which it is levied of their property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution.

That Congress may impose an excise tax upon the carrying on of a particular business is, of course, well established. Of this character was the excise imposed upon the insurance business and upheld in *Pacific Insurance Co.* vs. *Soule,* 7 Wall., 433, and that imposed upon the refining of sugar and petroleum and upheld in *Spreckels Sugar Refining Co.* vs. *McClain,* 192 U. S., 397. The taxes considered in both of those cases, however, were exacted from all persons, co-partnerships and corporations engaged in the particular business excised and there was, therefore, no element of arbitrariness or inequality contained in the Acts imposing them. In addition to these Congress has at various times passed numerous other Acts imposing excise taxes upon selected and classified occupations, callings or privileges, none of which, however, bore any resemblance to the present act. Here, for the first time, we have a tax claimed to be an excise which is levied upon every conceivable business, occupation or calling in which any individual, co-partnership, joint stock association or corporation may engage, but limited to those only

who carry on such business in joint stock or corporate form. The result is to impose upon one competitor in a particular line of business a burden that is not imposed upon another engaged in the same line, with the ultimate effect, of compelling the discontinuance of the business discriminated against which could only be carried on under such circumstances at a ruinous disadvantage.

Undoubtedly Congress may classify the objects of taxation, but such a classification must be reasonable and must be based upon characteristics which differentiate persons and objects within the class from those who are omitted and it must include all who are within the principle upon which it is based. No classification, we submit, could be more unreasonable, arbitrary or vicious than one which includes, for the purpose of taxation, some members of a class engaged in a competitive business and excludes others of the same class. The result of such a classification must be to favor some at the expense of others and violate the principle of equality which lies at the basis of all just legislation. In *Cooley on Taxation,* at page 259, it is well said:

> "Inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. Such a restricted tax might, on the other hand, under some circumstances, be as equal and just as any that could be laid. A tax laid exclusively on merchants' goods might not be burdensome to those who, in the first instance, paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who

followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made; whether it be because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies; as if loans of money were in general taxed, but those made by named persons, or by residents of a named locality, were exempted; in which case the injustice would be so manifest that none could defend it."

If Congress may impose an exclusive tax upon corporations and joint stock associations with respect to the carrying on of a business which others may engage in upon equal terms, why may it not impose a like tax upon single men, women, foreign born citizens, or red-haired men? If the principle of arbitrary selection be once allowed, who can set bounds to its exercise?

And not only are corporations and joint stock associations arbitrarily selected for taxation, but some corporations are as arbitrarily exempted. Thus

the Act exempts fraternal benefit societies, orders or associations operating under the lodge system, and domestic building and loan associations.

The enormous business done by the last-named associations is well known. Their profits are greater than those of the average bank, trust company or savings institution. They are in no sense public, charitable, religious or benevolent associations. They engage in business solely for the profit of their members and they compete directly with savings banks, trust companies and insurance companies in the loaning of money. Why should the latter be taxed and they exempted? What is there in their business that justifies a discrimination in their favor as against savings banks and mutual insurance companies? Referring to the exemption of these associations in the Income Tax Act of 1894, Mr. Justice Field in the Pollock case said (p. 598):

> "The property of these institutions is exempted from taxation to the extent of millions. They are in no sense benevolent or charitable institutions, and are conducted solely for the pecuniary profit of their members. Their assets exceed the capital stock of the national banks of the country. * * * The census report submitted to congress by the President, May 1, 1894, shows that their property in the United States amounts to over $628,000,000. Why should these institutions and their immense accumulations of property be singled out for the special favor of Congress, and be freed from their just, equal and proportionate share of taxation, when others engaged under different names, in similar business, are subjected to taxation by this law?"

So with fraternal benefit associations doing business under the lodge system. How do they differ in principle from mutual life insurance associations? Both exist for the benefit of their members and neither is more benevolent or beneficial to society than the other. They are in constant competition everywhere for business and yet one is taxed on the business it does and the other exempted. To quote again from the opinion of Mr. Justice Field in the Pollock case (p. 595):

> "Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the legislature to exempt them. (Citing cases.) Cooley in his treatise on Taxation (2d Ed., 215), justly observes that 'It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation."

Nor do the unequal, arbitrary and discriminating features of the Taxing Act end here or affect corporations and joint stock associations alone as a class, but they are also to be found within the selected class itself. We call attention to three of them that directly affect the defendant corporations in these cases.

1. The tax, although purporting to be a tax on the doing of business is not limited to the in-

come derived from the business done, but is imposed upon, or calculated according to, the entire net income over and above Five thousand dollars, received by the owner, from all sources whatsoever. The result is that if one corporation derives a net income of $100,000 wholly from a business carried on by it and another carrying on a business of the same kind and making an equal profit, receives an additional income of $100,000 from investments which may be in State or United States bonds, exempt from taxation, one is taxed one thousand dollars and the other two thousand for the exercise of exactly similar privileges with exactly similar results.

Of the victims of this discrimination, defendant Home Life Insurance Company is one. It has over $16,000,000 invested in interest bearing securities, upwards of $1,100,000 of which consists of undivided profits; and these investments, to the extent of several hundred thousand dollars are in State, Federal or municipal securities (Record, p. 2, fol. 3). If any part of the interest derived from these investments can be said to be income from business that cannot be said of the interest from the $1,100,000 of undivided profits, and yet the company is required to pay the same tax upon this latter as upon the earnings from its business.

2. The Act provides for a deduction from the gross income received by the corporation or joint stock association taxed, on account of interest paid on its bonded or other indebtedness, up to the amount of its capital stock, and no more. The result is, that if one corporation has $1,000,000 of capital and $1,000,000 of indebtedness, upon the latter of which it pays interest at the rate of four and one-half per cent., and makes in a given year

a profit over operating expenses of $50,000, it has no tax to pay because it is allowed a deduction on account of the $45,000 paid as interest on its indebtedness, while another corporation doing the same amount of business and making the same profit above operating expenses is compelled to pay tax on $45,000 of its gross income if it happens to have a capital stock of only one hundred thousand and an indebtedness of eleven hundred thousand upon which it pays the same rate of interest. In other words, a corporation in the situation last supposed is compelled to pay a tax not upon its net income—for it has none—but upon the interest of what it owes. This feature of the Act operates directly against defendant The Coney Island and Brooklyn Railroad Company. That Company has a capital of $2,983,900 and an indebtedness of $3,700,000 (Record, p. 3, fol. 5), making a difference of $716,100. On its indebtedness it pays interest at the rate of four per cent., which on $716,100 amounts to $28,644. It is required by the Act to pay a tax on its total net income, and on this $28,644 besides.

3. The Act requires corporations and joint stock associations to pay a tax on their *entire* net income received from all sources and so compels a corporation or joint stock association doing business both here and abroad to pay a tax upon the income of its foreign business for the privilege of doing its business here, notwithstanding that its domestic business may be less than five per cent. of its total business. That the effect of this is a discrimination against the larger life and fire insurance companies is apparent. These companies, as is well known, do a world business. In the

United States and its dependencies they compete everywhere with the foreign insurance companies. The latter, however, by the terms of the Act are only required to pay a tax on their net income derived from the business they do in this country, while the domestic companies, for the privilege of doing the same business, are compelled to pay a tax on their foreign business, which in some cases may be so large as to make it impossible for them to compete successfully here with their foreign rivals.

In *People* vs. *Mensching*, 187 N. Y., 8, the New York Court of Appeals had before it an Act imposing a tax on transfers of stock of domestic and foreign corporations calculated at the rate of two cents "on each share of $100 of face value *or fraction thereof*". The Act was held unconstitutional because the tax imposed did not operate alike on all stock, but, without any basis for classification, bore heavily on some stock and lightly on other stock. The Court said (pp. 18, 21):

> "While the legislature has wide latitude in classification its power in that regard is not without limitation. * * * While the state can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of

reason for it. * * * Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation, and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.' (Citing cases.) By the statute before us the tax is laid upon sales, and the class of sales taxed consists of corporate shares, but all members of the class are not treated alike, since one is taxed many times as much as another, although worth no more. Two corporations may be doing the same kind of business upon the same amount of capital, with assets of the same value, and shares aggregating the same face value, but if a share in one has but half the face value of a share in the other, still the sale of the same number of shares in each would be taxed the same amount, in manifest disregard of justice and principle. * * * This is not classification, but arbitrary or accidental selection. The statute breaks into the class, and with eyes shut strikes some, and lets others go. The rule governing the subject as laid down by the Supreme Court of the United States, is that there must be 'some difference which bears a reasonable and proper relation to the attempted classification.' It cannot be 'mere arbitrary selection'."

If these various arbitrary selections and discriminations are permissible, what is to hinder a majority of Congress from destroying any or all

State corporations, or any or all State franchises, at its mere will or whim? And if this can be done, what do constitutional guaranties amount to and what is to become of the reserve rights of the States? We earnestly protest that Congress has no such arbitrary power; that the existence of such a power would be in conflict with the fundamental principles upon which our government was established; that the first ten amendments to the Constitution were adopted for the very purpose of safeguarding the States against the attempted exercise of such a power, and that the provisions of the Fifth Amendment declaring that "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation," furnish ample protection against its attempted exercise in a case like the present.

Hamilton, writing for the *Continentalist*, said:

> "The genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the State demands; whatever liberty we may boast of in theory, it cannot exist in fact while (arbitrary) assessments continue." (1 Hamilton's Works, Edition 1885, 270.)

Speaking upon the same subject, Mr. Justice Field, in the Pollock case, said (p. 599):

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax. This

> inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress."

In Dillon on Municipal Corporations at Section 736, it is said:

> "Equality, indeed, so far as practicable, is inherent in the very idea of a tax, as distinguished from arbitrary exaction."

At Section 737, it is further said:

> "Taxation * * * implies that the imposition shall be upon some system of apportionment, so as to secure uniformity among those who are, or ought to be, subject to the particular tax or assessment; and hence we may readily conceive of acts of the legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the Constitution should be infringed."

In Desty on Taxation at Section 10, it is said:

> "Equality in the imposition of the burden is of the very essence of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule tending to that end is indispensable. * * * Where property is taken from the citizen by the sovereign will and appropriated without his consent, to the benefit of the public, the exaction should not be considered as a tax unless similar contributions are exacted from such constituent members of the same community generally as own the same kind of property. * * * A tax may be a capitation or a property tax, direct or indirect, *ad valorem* or specific, and though it may not be universal, yet it must be general and uniform."

In *People* vs. *Salem*, 20 Mich., 452, the Supreme Court of Michigan held a statute invalid, as not within the taxing power, irrespective of any constitutional limitations. In discussing the subject, the Court said (Cooley, J., p. 473):

> "It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words. * * * I understand that, in order to render valid a burden imposed by the Legislature under an exercise of the power of taxation, the following requisites must appear. * * * 2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. * * * Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. * * * The principles here stated are fundamental maxims in the law of taxation. They inhere as conditions in the power to impose any taxes whatsoever, or to create any burden for which taxation is to provide; and it is only when they are observed that the legislative department is exercising an authority over this subject which it has received from the people, and only then is that supreme legislative discretion of which the authorities speak called into action."

In *State* vs. *Township of Readington*, 36 N. J. L., 66, 70, Depue, *J.* (afterwards Chief Justice), said:

> "A tax upon the persons or property of A, B and C, individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation and not of taxation."

In *State* vs. *Mayor of Newark*, 37 N. J. L., 415, 421, Beasley, *C. J.*, said:

> "I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation, is not a limited right. * * * If such prerogative has no trammel or circumscription, then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon specified property, does not exist."

In *Durach's Appeal*, 62 Pa. St., 491, 494. Sharswood, *J.*, said:

> "There is no limitation of these powers" (*i. e.*, the power of taxation by municipal governments) "expressed in the constitution of Pennsylvania as there is in the constitutions of some of our

> sister States; but, nevertheless, there are limits in the nature of things. The Legislature cannot, under the name of taxation, take private property for public use without making compensation, and a special tax levied upon an individual, or upon particular individuals, would infringe this restriction."

As is well understood, the Due Process clause of the Fifth Amendment is an adaptation of the provisions of Magna Charta guaranteeing Englishmen against the deprivation of life, liberty or property except by the judgment of their peers and the law of the land.

"Due Process of Law" and "The Law of the Land," therefore, mean the same thing in constitutional law, and as remarked in *Bank of Columbia* vs. *Okely*, 4 Wheat., 235, 244:

> "After volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the *arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*". (Italics ours.)

In State *vs.* Ashbrook, 154 Mo., 375, it is said that the term "Due Process of Law" as construed by the Supreme Court of Missouri and all other courts of the land means "The Law of the Land," and that "*These words when having reference to legislative enactments, must mean a requirement of action or abstinence, binding upon and affecting alike each and every member of the community of the same class or of similar circumstances.*" (Italics ours.)

The term Due Process of Law is also to be found in the Fourteenth Amendment and Mr. Justice Field speaking of it in that connection in the *Santa Clara Tax case*, 9 Sawy., 170, 187, said:

> "The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation levelled against special classes has been the fruitful means of oppressions, and the cause of more commotions and disturbances in society, of more insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the *San Mateo* case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read as contended it does in law—'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation*—nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*' No such limitation can be thus engrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation, without due process of law, is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

In *Loan Ass'n* v. *Topeka*, 20 Wall., 655, 663, the Court said:

> "Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. * * * The power to tax is, therefore, the

strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch* v. *The State of Maryland*, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."

In *Hurtado* v. *People of California*, 110 U. S., 517, 534, it is said:

"We are to construe this phrase [due process of law] in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. * * * Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest se-

curity for which resides in the right of the people to make their own laws, and alter them at their pleasure. * * * But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public

agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

In *Barbier* v. *Connolly*, 113 U. S., 27, 31, it is said:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no *arbitrary* deprivation of life or liberty, or *arbitrary spoliation of property*, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; *that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.*" (Italics ours.)

In *Re Kemmler*, 136 U. S., 436, 448 (1889), it is said:

"In Hurtado *v.* California, 110 U. S. 516, 534, it is pointed out by Mr. Justice Matthews, speaking for the court, that the words 'due process of law,' as used in the Fifth Amendment, cannot be regarded as superfluous, and held to include the matters specifically enumerated in that article, and that when the same phrase was employed in the Fourteenth Amendment it was used in

the same sense and with no greater extent. As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. *Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights.*" (Italics ours.)

In Leeper *vs.* Texas, 139 U. S., 462, 468, it is said that due process of law is *secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.* (Italics ours.)

In Giozza *v.* Tiernan, 148 U. S., 657, 662, it is said that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property and secures equal protection to all under like circumstances in the enjoyment of their rights, *and that due process of law within the meaning of the amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government.*

The definition of "Due Process of Law" as given

in the last mentioned case is repeated in Duncan *v.* State, 152 U. S., 377.

In *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S., 150, 154, 159, it is said:

> "It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. (Citing cases.) The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens. But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."
>
> * * * * *
>
> "Arbitrary selection can never be justified

by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo *v.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. *No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.* (Italics ours.)

POINT V.

Whatever view may be taken of the Act in its other aspects, it must be held unconstitutional, so far as it imposes a tax on the franchises or business of State railroads or other public service corporations, because an interference with State agencies or instrumentalities.

The franchises of intra-state railroad corporations (like appellee, The Coney Island and Brooklyn Railroad Company), are conferred by a State for public purposes. These corporations are formed, in part at least, for the purpose of aiding the State in the discharge of a governmental function; viz., to provide means of transit and intercommunication for its citizens and troops. Their business is of a public character, subject to regulation by the State in the public interest and not to be abandoned without the State's consent. They are controlled or are controllable in all their operations by the State, which has the right, not infrequently exercised, of fixing the rates they shall charge and prescribing in detail the service they shall render. In exercising the power of eminent domain, they exercise a power and perform a function of the State which charters them. The exercise of this power is part of their business. With some of them it doubtless constituted a part of the business transacted during the year ending December 31, 1909, which is what the Act purports to tax.

Conceding the right of the General Government to tax the *property* of these corporations as dis-

tinguished from their franchises or business (Railroad Company *v.* Peniston, 18 Wall., 5), it is not perceived how Congress can tax their franchises or business without violating the well-established principle that neither the General Government nor a State can tax the agencies or instrumentalities of the other.

The South Carolina Dispensary case (South Carolina *v.* United States, 199 U. S., 437) is authority for the proposition that a business private in its nature is not taken out of the field of Federal taxation merely because a State sees fit to engage in it. Conversely, we submit, a function or business governmental in its nature is not thrown into the field of Federal taxation merely because a State entrusts its exercise to a railroad company or other public service corporation.

We have insisted and we still insist that *California* v. *Pacific Railroad Co.*, 107 U. S., 1, is authority for the proposition that Congress cannot tax any franchise granted by the State for either public or so-called private purposes. If this be denied it will hardly be denied that the case is authority for the proposition that Congress cannot tax a State corporation existing as an agency of the State, nor do we think it can be successfully claimed that the railroad in the case mentioned was a Federal agency in any other sense than a State railroad in the State of New York is an agency of that State.

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CORPORATION TAX CASES.

Supreme Court of the United States.

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FILED
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OCTOBER TERM, 1910.
Nos. 409 AND 410.

WYCKOFF VANDERHOEF,
Appellant,

vs.

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY ET AL.,
Appellees.

FRANCIS L. HINE,
Appellant.

vs.

HOME LIFE INSURANCE COMPANY ET AL.,
Appellees.

Brief for Appellants on Reargument.

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Supreme Court of the United States,

OCTOBER TERM, 1910, NOS. 409 AND 410.

WYCKOFF VANDERHOEF,
Appellant,
v.
THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY *et al.*,
Appellees.

FRANCIS L. HINE,
Appellant,
v.
HOME LIFE INSURANCE COMPANY *et al.*,
Appellees.

BRIEF FOR APPELLANTS ON REARGUMENT.

Statement.

The general question presented in these cases is the constitutionality of Section 38 (known as the Corporation Tax Act), forming part of the Act of Congress

approved August 5, 1909, (Statutes of the U. S. passed at the First Session of the Sixty-first Congress, 1909, pp. 11, 112-117) generally known as the "Tariff Act." The section is printed in full as an appendix to this brief.

These cases were numbers 751 and 752 on the docket of the October Term, 1909, and were originally argued and submitted in March, 1910. A reargument having been ordered we have taken the opportunity to rewrite our brief with special reference to the arguments then advanced by our opponents.

The cases come up from the Circuit Court of the United States for the Southern District of New York.

Each case came on to be heard below on bill and general demurrer, and in each a final decree was entered sustaining the demurrer and dismissing the bill; and thereupon an appeal was prayed and allowed direct to this Court on the ground that the constitutionality of a law of the United States was drawn in question.

As the questions of law involved in the two appeals are similar they will be dealt with in one brief. It will be necessary, however, to state the facts in the two suits separately.

Number 409.

This was a bill filed by Wyckoff Vanderhoef, a citizen of the State of New York, on behalf of himself and all other stockholders of the defendant company similarly situated, against The Coney Island and Brooklyn Railroad Company, a corporation of the State of New

York, and its directors. The facts alleged in the bill and admitted by the demurrer may be briefly summarized as follows:

The defendant corporation is a street railway company organized under the laws of the State of New York and owning and operating various street railroads situated within said State and upon the public streets thereof. Its right to construct and operate its railroads in the public streets has been conferred by various special acts of the Legislature of the State of New York. Under the laws of said State it is authorized, by reason of the public nature of its business, to exercise the right of eminent domain, and substantial portions of the land now occupied and used by its railroads were acquired by it in condemnation proceedings (Record, fols. 2-4).

The Capital Stock of said corporation consists of $2,983,900, divided into shares of the par value of $100 each. Said corporation has a bonded indebtedness of $3,500,000 and other indebtedness in excess of $200,000. Its net income from all sources during the year ending December 31, 1909, amounted to more than $205,000, after making all deductions of the character provided for in the Corporation Tax Act (Sec. 38 of the Act of Congress, approved August 5, 1909, entitled "An Act to provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes") (fols. 4-5).

The appellant is, and for a number of years has been, the owner and registered holder of ten shares of

the said corporation's capital stock, which shares are of large value. The capital stock of said corporation is divided among a large number of different persons, and this suit is for an object common to all (fol. 6). The said corporation and its directors have announced their intention voluntarily to comply with the provisions of the Corporation Tax Act, by making and filing the return and paying the tax therein provided for (fols. 6-7). Appellant has requested the corporation and its directors in writing to refrain from voluntarily making the return and paying the tax, and they have refused to comply with his request, asserting as a reason that such compliance would subject the corporation to litigation with the United States and the risk of incurring penalties and of clouding the title to its real estate (fols. 10-11, 16-17). The tax which the defendant corporation would have to pay upon its net income for the year ending December 31, 1909, under the provisions of said Act, would exceed the sum of $2,000 (fol. 7). The bill charges that the provisions of the said Act imposing said tax are unconstitutional upon various grounds (fols. 7-10). As the grounds relied upon will be hereinafter stated and argued, it is unnecessary to set them forth here.

The bill further alleges that if the defendant corporation and its directors pay the tax, as they have declared their intention to do, they will thereby diminish the assets of the company and lessen the value of its stock and the dividends thereon, and that voluntary compli-

ance with the provisions of the Act will expose the Company to the risk of a multiplicity of suits which would work irreparable injury to the business of the Company and involve it and its stockholders, including appellant, in irreparable loss (fol. 11). The bill further alleges that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000, and arises under the Constitution and laws of the United States, and that appellant and the other stockholders of the defendant corporation have no adequate remedy at law in the premises (fol. 12).

The prayer of the bill is that the taxing provisions of the said Act be adjudged unconstitutional, null and void, that the defendants be restrained from voluntarily making the returns and paying the tax therein provided for, and for general relief (fol. 12).

Number 410.

This was a bill filed by Francis L. Hine, a citizen of the State of New York, on behalf of himself and all other stockholders and policyholders of the defendant company similarly situated, against Home Life Insurance Company, a corporation of the State of New York, and its directors. The facts alleged in the bill and admitted by the demurrer may be briefly summarized as follows:

The defendant is a corporation organized under the laws of the State of New York and engaged in the busi-

ness of insuring lives. Its capital stock consists of $125,000 divided into 1,250 shares of the par value of $100 each, and its accumulated profits and other assets exceed in value the sum of $22,000,000. By the laws of the State of New York the Company is required to invest its capital to the extent of $100,000 in the stocks or bonds of the United States or of the State of New York or of the municipalities thereof, or in bonds and mortgages on improved unincumbered property in said State, and is authorized to invest the residue of its capital and its surplus moneys and funds in the securities aforesaid or in certain other specified kinds of real and personal property. The greater part of its assets are actually invested in real estate, United States Government bonds, bonds of the State of New York, corporate stocks of the City of New York, bonds of other municipal corporations within the United States, bonds and stocks of other solvent institutions incorporated under the laws of the United States or of one or more of the States, and real estate bonds and mortgages. (Record, fols. 2-3.) Included in its assets invested as aforesaid are $1,112,000 and upwards of "unassigned funds," said unassigned funds being undivided profits (fol. 3). Its net income during the year ending December 31, 1909, amounted to a sum in excess of $450,000 after making all deductions of the character provided for in the Corporation Tax Act (fol. 4). Appellant is, and for a number of years has been, the owner and registered holder of ten shares of the said Com-

pany's capital stock of a value exceeding $2,000. By the charter of said Company it is provided that the holders of its capital stock shall receive semi-annually dividends of six per cent., but shall not further share in the profits of the Company except as they may be entitled as policyholders. The capital stock of the Company is divided among a large number of different persons, and this suit is for an object common to them all. The charter of the Company further provides that the insurance business of the Company shall be conducted on the principle of giving to policyholders an interest in the profits of the Company (unless otherwise agreed between the Company and the insured), and further provides that the net profits of the Company shall be ascertained annually and shall be apportioned to the holders of policies who may be entitled to participate in the profits according to their respective contributions thereto. Appellant is the holder of a $2,500 policy of life insurance issued by said Company in 1891, and under the terms thereof is entitled to participate in the profits of the Company as the same shall be ascertained and apportioned from year to year, according to the provisions of its charter. The policyholders of the Company holding participating policies are very numerous, comprising more than forty-three thousand and representing in the aggregate more than eighty-one million dollars of life insurance, and this suit is for an object common to them all (fols. 5-6). The corporation and its directors have announced their intention

to voluntarily comply with the provisions of the Corporation Tax Act by making and filing the return and paying the tax therein provided for (fol. 6). Appellant has requested the corporation and its directors in writing to refrain from voluntarily making the return and paying the tax, and they have refused to comply with his request, asserting as a reason that such compliance would subject the corporation to litigation with the United States (fols. 10, 16-17). The tax which the corporation would have to pay upon its net income for the year ending December 31, 1909, under the provisions of the Act would exceed the sum of $4,500 (fol. 7). The bill charges that the provisions of the Act are unconstitutional upon various grounds (fols. 7-10). As the grounds relied upon will be hereinafter stated and argued it is unnecessary to set them forth here.

The bill further alleges that if the Company's directors pay the tax as they have declared their intention to do they will thereby diminish the assets of the Company and lessen the funds applicable to the payment of dividends on its capital stock and participating policies including the stock and policy held by appellant; that it would be impossible to ascertain and measure the amount of damage and loss to appellant resulting therefrom; that said damage would be irreparable and incapable of ascertainment in an action at law (fol. 11); that voluntary compliance with the provisions of the Act will expose the Company to the risk of a multi-

plicity of suits not only by its shareholders, but also by its numerous policyholders; and that in such suits all the policyholders of the Company, including appellant, would or might be necessary and proper parties by reason of their interest in the net income of the Company, and that such suits would work irreparable injury to the business of the Company and to appellant and the Company's other stockholders and participating policyholders (fol. 12). The bill further alleges that this is a suit of a civil nature in equity and that the matter in dispute exceeds, exclusive of interest and costs, the sum of Two thousand dollars, and arises under the Constitution and laws of the United States (fol. 12). The prayer of the bill is that it be adjudged that the taxing provisions of the said Act are unconstitutional; that the defendants be restrained from voluntarily making the returns and paying the tax therein provided for; that the defendant Company be required to specifically perform the terms of its policy contracts with appellant and other policyholders similarly situated, by apportioning to him and them their respective shares of the net income of the Company without subtraction or diminution by reason of anything contained in the Corporation Tax Act, and for general relief (fols. 12-13).

SPECIFICATION OF ERRORS RELIED UPON.

I.

That the Court below erred in sustaining the demurrer and dismissing the bills for want of equity.

Record in No. 409, fol. 28, Assignments of Error X, XI and XII;

Record in No. 410, fols. 27, 28, Assignments of Error XI, XII and XIII.

II.

That the Court erred in not holding that Section 38 of the Act is void because as to State corporations it constitutes an interference with sovereign powers and functions of the States not surrendered to the general government and expressly reserved to the States by the 10th Amendment.

Record in No. 409, fol. 25, Assignments of Error I, II and III.

Record in No. 410, fols. 23, 24, Assignments of Error I, II and III.

III.

The the Court erred in not holding that the taxes imposed or some portions thereof are direct taxes and

that the provisions imposing the same are void because the taxes are not apportioned among the States.

Record in No. 409, fol. 26, Assignment of Errors IV;
Record in No. 410, fol. 25, Assignment of Errors IV.

IV.

That the Court erred in not holding that Congress could not tax the stocks and bonds of States and municipalities thereof, and in not sustaining the bill to that extent.

Record in No. 410, fol. 25, Assignment of Errors V.

V.

That the Court erred in not holding that said section of said Act is unconstitutional because the tax it imposes is arbitrary, non-uniform and unequal, and makes illegal discriminations and exemptions.

Record in No. 409, fols. 26, 27, Assignments of Error V, VI, VII and VIII.
Record in No. 410, fols. 25-27, Assignments of Error VI, VII, VIII and IX.

VI.

That the Court erred in not holding that the tax is unconstitutional so far as the same is imposed on the

franchises or business of State railroads and other public service corporations.

Record in No. 409, fol. 25, Assignments of Error II and III.

PRELIMINARY POINT.

Equity has jurisdiction, at the instance of a stockholder, to restrain the threatened breach of trust on the part of directors in voluntarily paying and not resisting the collection of an unconstitutional tax.

Pollock *v.* Farmers Loan & Trust Co., 157 U. S., 429, 553;
Dodge *v.* Woolsey, 18 How., 331;
Hawes *v.* Oakland, 104 U. S., 450.

It is unnecessary to argue this point at length in view of the careful consideration which the question received in the Income Tax Cases (Pollock *v.* Farmers Loan & Trust Co.). These suits are similar in nature and procedure to the Pollock case, which is believed to have settled the jurisdictional questions involved.

Since these cases were originally argued in this court and a reargument ordered the due date of the tax for the first year (June 30, 1910), has passed, and if defendants have carried out their avowed intention

the tax for said year has been paid. This fact may possibly be urged as ground for dismissing the appeals, on the theory that the Court does not sit to determine moot questions.

To take notice of any such claim the Court would be obliged to go outside the record. Even were the Court willing to do this the claim would be found to be without merit because

> (*a*) To enjoin the payment of the tax for a single year was not the whole object of these suits. The bills sought to have the act declared unconstitutional and to prevent all payments thereunder, future as well as present.

As said by Holmes, *J.*, in Giles *v.* Harris, 189 U. S., 475, 484 (a suit in equity to compel the Board of Registrars to enroll plaintiff's name upon the voting list):

> "The bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled to cast a vote in that election is not, as in Mills *v.* Green, 159 U. S., 651, 657, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903."

The principal object of the relief sought in the cases now before the Court is to prevent the defendants from wasting corporate assets in which plaintiffs have an interest by compliance with a statute which plaintiffs allege to be unconstitutional. The cases involve a grave public question whose importance is in no wise diminished by the payment of one year's tax (assuming such payment to have been made).

> (*b*) If payment of the tax for the first year has in fact been made, defendants have made it after notice and pending the determination of suits involving their right to make it.

The situation differs radically, therefore, from that involved in the cases where this Court has dismissed an appeal owing to the happening of some event *without default of the defendant,* which renders it impossible for the Appellate Court to grant plaintiffs any effectual relief (see *e. g.* Mills *v.* Green, 159 U. S., 651). In that case the difference is pointed out by Justice Gray, as follows (p. 654):

> "If a defendant, indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house, or of a railroad, or of any other structure, persists in completing the building, the court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant

to undo what he has wrongfully done since that time or to answer in damages."

It would be a novel situation if defendants by their own act could render the court powerless and plaintiffs remediless. The court has power not only to enjoin such conduct in the future, but also to afford, under the prayer for general relief, suitable redress for what has already been done.

These are suits to restrain a threatened breach of trust by the directors of a corporation. They are not suits by a taxpayer to enjoin the collection of a disputed tax, and the decisions holding that in such cases the payment of the tax is ground for dismissal of the appeal (*e. g.* San Mateo County *v.* Southern Pacific, 116 U. S., 138; Little *v.* Bowers, 134 U. S., 547; Singer Co. *v.* Wright, 141 U. S., 696), have no application.

POINT I.

Nature of the tax; it is not a tax upon business or occupation, but is either

(a) A corporate franchise tax, or

(b) An income tax.

The first thing to be ascertained is the exact nature of the tax. This will depend on the factors which de-

termine when and whether the tax shall be levied. The Act provides:

> "SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources."

Two factors (possibly three) determine when and whether the tax shall be levied. They are:

(1) Existence as a corporation or other artificial entity;

(2) Receipt of income;

(3) Doing business.

Of these factors the first two must unquestionably be present. As to the third there is room for doubt. The language of the Act with respect to domestic cor-

porations is "*Every* corporation * * * now or hereafter organized * * * shall be subject to pay." Corporations doing no business are nowhere expressly exempted. The words "engaged in business in any State or Territory" apparently apply only to foreign corporations.

If the tax is to be construed as falling on domestic corporations which do no business, there is an end of the claim that the subject of the tax is business or occupation. A tax cannot be imposed on something that does not exist. If, however, the tax be construed as limited to corporations actually engaged in business, it by no means follows that the tax is an occupation tax. Section 32 of the Act of August 27, 1894, under which the Income Tax cases of 1895 arose, applied only to "corporations, companies or associations *doing business for profit* in the United States." Nevertheless the tax was held to be a direct tax and not an excise, so far at least as income from investments was concerned (Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429; 158 *Id.*, 601). Moreover, taxes limited to corporations doing business have frequently been classified as corporate franchise taxes (see, *e. g.*, Home Ins. Co. *v.* New York, 134 U. S., 594).

The Act describes the tax as "a special excise tax with respect to the carrying on or doing business" by the corporations, joint stock companies and insurance companies on which it is imposed.

These words were taken almost verbatim from the

opinion of this Court in *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S., 397, and it is matter of public record, in the Senate debates on the subject, that the Spreckels case was supposed to afford a precedent for the tax sought to be imposed.

See *e. g.* Congressional Record for June 16, 1909, p. 3450; *Id.* for July 1, 1909, pp. 4069, 4077-8, 4079.

In the Spreckels case a tax had been imposed on a corporation carrying on the business of refining sugar, under an Act of Congress providing:

> "That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed two hundred and fifty thousand dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars."
>
> (Act of June 13, 1898, Section 27.)

This Court sustained the tax as an excise tax on business or occupation, saying (p. 411):

> "Clearly the tax is not imposed upon gross annual receipts as property; but only *in respect*

of the carrying on or doing the business of refining sugar."

It seems to have been assumed when these words were inserted in the present Act that they carried with them the nature of the tax concerning which they were spoken. We believe it can readily be demonstrated that this assumption was erroneous, that the present tax differs fundamentally in its nature from the tax involved in the Spreckels case, and that it is not a tax on business or occupation.

A

The tax is imposed only on artificial persons. Individuals and ordinary partnerships engaged in similar businesses are not taxed. The act construed in the *Spreckels* case, on the contrary, applied to "every person, firm, corporation or company" carrying on the business specified.

The fact that a tax is imposed on A and B and not on C and D, when all are carrying on the same kind of business, indicates that something else besides business or occupation is the subject of the tax.

It is of course true, as asserted by some of our opponents (see brief of Mr. Guthrie and associates of March 14, 1910, p. 11), that the States have frequently imposed excise taxes on corporations only, and that such taxes have been upheld by this Court. They have been upheld, however, as *franchise* taxes, imposed not only under the taxing power but also under the power

to regulate corporations. We have been unable to find a case where such a tax has been upheld as an *occupation* tax.

B

The tax is measured by a percentage of the net income, not from business carried on, but "*from all sources.*" In the act construed in the *Spreckels* case, on the contrary, the tax was limited to income received in the business sought to be taxed. This difference would seem to be decisive against the claim that the tax is to be construed as a tax on the businesses in which the various artificial persons subject to its operation are engaged. The measure adopted bears no necessary relation to, and does not vary reasonably with, the value of such businesses. One corporation engaged in a business which yields a net profit of $5,000 pays no tax. Another corporation doing a precisely similar business at the same profit is nevertheless taxed provided it has an additional income from investments.

Our opponents seek to meet this difficulty in two ways.

1st. They argue that the words "from all sources" taken in connection with the context should be construed as limited to income from business and property used in business (see Government Brief of March, 1910, p. 40; Brief of Messrs. Guthrie *et al.* of March 14, 1910, p. 18). This construction, however, ignores the plain meaning of the words "from all sources."

Moreover, it is opposed to the explicit provisions of the Act subjecting to the tax (in the case of foreign corporations) "income received within the year from business transacted *and capital invested* within the United States."

2nd. Mindful of these difficulties, counsel for the Government advance the proposition that, in the case of a corporation, income "from all sources" means substantially the same thing as income from business, because the capital and surplus of a corporation, however invested, must be deemed to be employed in its business. To quote their exact language (Brief, p. 43):

> "A corporation * * * has no right to hold any property except for the purposes of the business, and therefore, as business assets * * *. No corporation can claim that it holds property in any other way * * *. It is legally estopped from questioning the business character of its assets."

The weaknesses of this reasoning are obvious. To mention a few of them:

(*a*) It entirely overlooks at least one source of corporate revenue, viz., gifts and subsidies. Railroads have frequently been the objects of State or municipal bounty. The income of manufacturing corporations is not infrequently augmented by subsidies of various kinds paid as an inducement to locate in a particular locality.

(*b*) It ignores various decisions of the Courts to the effect that the mere holding of investments and receiving income therefrom does not constitute "doing business" in the legal sense in the case of corporations any more than in the case of individuals.

In *People ex rel. Singer Mfg. Co.* v. *Wemple*, 150 N. Y., 46, the New York Court of Appeals held that a New Jersey manufacturing corporation carrying on a portion of its business in New York and having a portion of its surplus earnings invested in real estate in New York leased by it to third parties was not, with respect to such investment, carrying on business in the State.

In *Missouri Coal and Mining Co.* v. *Ladd*, 160 Mo., 435, the question was whether a foreign corporation organized for the purpose of mining, which had ceased mining and leased its lands for agricultural purposes, paying taxes thereon and receiving rents therefrom, was doing business in the State. The Supreme Court of Missouri held that it was not.

(*c*) The argument, if valid now, would have been equally good in the Income Tax cases of 1895 (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429). In those cases this Court held that a tax on income derived by a corporation from investments in real and personal property was a direct tax on such property. If, as now suggested in the Government brief, all income of a corporation is to be considered business income, the Court

and counsel in the *Pollock* case wholly overlooked a point decisive of the controversy, and the case was wrongly decided.

C.

No kind or kinds of business are specified. The tax falls indiscriminately on the entire net income of all artificial persons (with certain enumerated exceptions not material to the present discussion) doing every conceivable kind of business. In the act construed in the Spreckels case, on the contrary, the tax was limited to certain specific businesses, viz., refining petroleum and refining sugar.

The difference is fundamental and marks two different kinds of tax. *The one is laid on business yielding income irrespective of who does it. The other is laid on persons possessing income irrespective of what business they do.* The former is the typical excise tax on business; the latter is a direct property tax (unless the limitation to artificial persons brings it within the class of corporate franchise taxes). A tax upon property or income generally, imposed merely because of ownership, is a property tax (see *Knowlton* v. *Moore*, 178 U. S., 41, at p. 81).

An excise tax on business, privileges, acts or commodities ordinarily involves the selection of some particular business, privilege, act or commodity to be taxed.

In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S., 217, the Court said, speaking of an excise tax (p. 227):

"The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue *certain* callings, or to deal in *special* commodities, or to exercise *particular* franchises" (italics ours).

In *Nicol* v. *Ames,* 173 U. S., 509, the Court said (p. 521):

> "A tax upon the privilege of selling property at the Exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property*" (italics ours).

This language is quoted with approval in *Fairbank* v. *United States,* 181 U. S., 283, 293.

In *Thomas* v. *United States,* 192 U. S., 363, the Court held that the stamp duty imposed by the War Revenue Act of 1898 on sales of shares of stock in corporations was an excise and not a direct tax. Chief Justice Fuller, speaking for the Court, said (pp. 370-371):

> "There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of *certain* commodities, privileges, *particular* business transactions, vocations, occupations and the like. * * *

The sale of stocks is a *particular* business transaction" (italics ours).

In *Patton* v. *Brady*, 184 U. S., 608, the Court held that a tax on a particular article (viz., manufactured tobacco), imposed at a period intermediate the commencement of manufacture and the final consumption of the article, was an excise. Justice Brewer, discussing the nature of an excise as distinguished from a direct tax, said (pp. 617-18):

> "Cooley, in his work on Taxation, page 3, defines it as 'an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue *certain* trades, or to deal in *certain* commodities.' Bouvier and Black, respectively, in their dictionaries, give the same definition. If we turn to the general dictionaries, Webster's International calls it 'an inland duty or impost, operating as an indirect tax on the consumer, levied upon *certain specified* articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue *certain* trades and deal in *certain* commodities.' * * * Counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax* cases, but, as we have seen, it is not a tax upon property as such, but upon *certain kinds* of property, having refer-

> ence to their origin and their intended use" (italics ours).

In *Knowlton* v. *Moore*, 178 U. S., 41, Justice White said (p. 47):

> "They (*i. e.*, inheritance and legacy taxes in France) are included officially under the general denomination of indirect taxes for the reason that all inheritance and legacy taxes are considered as levied on the 'occasion of *a particular isolated* act' " (italics ours).

We do not claim, as our opponents seem to assume, that Congress *cannot* impose an excise tax in general terms upon all business and occupations without separate enumeration. The question is not what Congress can do but what has actually been done in this instance. In determining this question it is proper to take into account the features which differentiate this from the ordinary type of occupation tax, as well as the features which assimilate it to taxes of a different nature.

D.

That the tax cannot properly be construed as a tax on business or occupation is also shown by other features of the Act: *e. g.*, it extends to corporations and joint stock associations engaged in the business of exporting, and requires them to pay a tax upon the net income derived from such business. Congress cannot tax the business of exporting as a business (Constitu-

tion, Art. I, Sec. 9, subdiv. 5; Brown *v.* Maryland, 12 Wheat., 419; Fairbank *v.* United States, 181 U. S., 283) and the inclusion of such a provision in the present Act adds to the difficulty of classifying the tax with business or occupation taxes. Again, the tax is imposed upon corporations and joint stock companies wheresoever they are engaged in business, and requires them to pay a tax upon income derived, not merely from business done in this country, but also from that done in foreign countries. This follows from the generality of the language employed and the provision for deducting taxes paid by such corporations and joint stock companies in foreign countries "as a condition to carrying on business therein." It can hardly be claimed that Congress has power to tax a business as such when carried on beyond the jurisdiction of the United States. As said by Justice Field in *State Tax on Foreign-Held Bonds,* 15 Wall., 300, 319:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

If Congress cannot tax foreign business, this feature of the present tax also stands in the way of its classification with occupation and business taxes.

It is unnecessary to argue that the nature of the tax does not depend on what Congress has seen fit to label it.

As was pointed out by the Court in the Pollock case (157 U. S., pp. 580-583): "The name of the tax is unimportant;" * * * "it is the substance and not the form which controls;" * * * the limitations of the Constitution cannot be "frittered away" by calling a tax indirect when it is in fact direct. And again in *Galveston, &c. Ry. Co.* v. *Texas,* 210 U. S., *217, 227,* the Court denied that "the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

POINT II.

If the tax be construed as a franchise tax, it constitutes, so far as state corporations are concerned, an interference with sovereign powers and functions of the states not surrendered to the general government and expressly reserved to the states by the Tenth Amendment.

As already shown (Point I, *supra*) the tax is not a tax on business or occupation. It follows that (if not an income tax) it is to be construed as a franchise tax, imposed in the case of domestic corporations and

joint stock associations upon the franchise to do business in their respective capacities, and in the case of foreign corporations and associations on the privilege of doing business in their respective capacities within the territorial jurisdiction.

Home Ins. Co. *v.* New York, 134 U. S., 594;
Society for Savings *v.* Coite, 6 Wall., 594;
Provident Institution *v.* Mass., *ibid.*, 611;
Maine *v.* Grand Trunk Ry. Co., 142 U. S., 217;
Horn Silver Mining Co. *v.* New York, 143 U. S., 305;
People *ex rel. v.* Knight, 174 N. Y., 475.

In the *Home Insurance Company* case this Court held (as stated in the headnote) that

> "A tax which is imposed by a State statute upon the 'corporate franchise or business' of all corporations incorporated under any law of the State or of any other State or country, and doing business within the State, and which is measured by the extent of the dividends of the corporation in the current year, is a tax upon the right or privilege to be a corporation and to do business within the State in a corporate capacity."

In *Society for Savings* v. *Coite* and *Provident Institution* v. *Mass.* (*supra*) it was held that a tax on savings banks measured by a percentage upon their deposits was a corporate franchise tax.

In *Maine* v. *Grand Trunk Ry. Co.* (*supra*) it was held that a tax on a foreign corporation measured by a proportion of its gross receipts within the State was "an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State" (p. 227). *Horn Silver Mining Co.* v. *New York* (*supra*) is to the same general effect.

The fact that the tax is laid on joint stock companies as well as on corporations does not necessarily indicate that it is not a franchise tax. Apparently the only joint stock companies taxed are such as have a statutory origin and enjoy franchises from the State. The language of the act is:

> "Every corporation, joint stock company or association * * * and every insurance company * * * *organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or * * * under the laws of any foreign country.*"

The words which we have italicized apparently qualify the words "joint stock company or association" as well as the words "corporation" and "insurance company," and seem to exclude from the operation of

the act such joint companies, if any there now be, as are merely common law partnerships. That many joint stock associations are artificial entities and possess and exercise legislative franchises substantially identical with those possessed and exercised by corporations is well established. (*Liverpool Insurance Co.* vs. *Massachusetts,* 10 Wall., 566; *People* vs. *Wemple,* 117 N. Y., 136; *Hibbs* vs. *Brown,* 190 N. Y., 167; *Adams Ex. Co.* vs. *State,* 55 Ohio St., 69; *Briar Hill Coal & Iron Co.* vs. *Atlas Works,* 146 Pa., 290; *Oak Ridge Coal Co.* vs. *Rogers,* 108 Pa., 147; *Attorney General* vs. *Mercantile Marine Insurance Co.,* 121 Mass., 524.)

Assuming then that this is the real nature of the tax, *i. e.*, that it is a tax upon corporate or quasi-corporate franchises, is it within the power of Congress to impose?

Unquestionably Congress may tax corporations organized under Federal law upon their franchises; any sovereignty may so tax its creatures; but corporations chartered by the States and doing only an intrastate business present a different situation. A State confers on John Doe and his associates the privilege or franchise of doing business in a corporate capacity. Can Congress impose a tax on the exercise of that privilege or franchise? The power to tax involves the power to destroy, and the power to destroy may defeat and render useless the power to create. (*McCulloch* v. *Maryland,* 4 Wheaton, 316.) If Congress can impose a tax of one per cent., it can impose a tax of ten

per cent. or fifty per cent., and thus impair or destroy altogether the value of corporate charters for business purposes. Does Congress possess such a power?

The right to grant corporate charters for ordinary business purposes is an attribute of sovereignty belonging to the States, not to the General Government. The United States is a Government of enumerated powers. The Constitution nowhere expressly confers upon Congress the right to grant corporate charters, and it is well settled that this right exists only in the limited class of cases where the granting of charters becomes incidental to some power expressly conferred. On the other hand, the right of the separate States to grant charters of incorporation is unquestionable. They had that right before the Union was formed and never surrendered it. In the Constitutional Convention of 1787, Mr. Madison twice moved that Congress be given power to grant charters of incorporation in certain cases, but the motions were not adopted.

(See Elliot's Debates on the Federal Constitution, 2nd Ed., Vol. V., pp. 440, 543.)

This Court has frequently recognized the plenary power of the States to grant and control the exercise of corporate franchises (See *e. g., Home Ins. Co.* v. *New York,* 134 U. S., 594, 600-601; *Horn Silver Mining Co.* v. *New York,* 143 *id.* 305, 313), and long ago said of it: *"This power is incident to sovereignty."* (*Briscoe* v. *Bank of Kentucky,* 11 Peters, 257, 317.)

The power to grant the franchise to do business in a corporate capacity being therefore inherent in the sovereignty of the States, it follows that a tax imposed by Congress upon the exercise of the franchise will constitute an interference with the power.

This court has said, and many times repeated in substance, that the National Government "cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action."

Railroad Company *v.* Peniston, 18 Wall., 5, 30.

Thus it has been held that Congress cannot tax the obligations of indebtedness of a State (*Mercantile Bank* v. *New York*, 121 U. S., 138, 162); that Congress cannot tax a municipal corporation (being a portion of the sovereign power of the State) upon its municipal revenues (*U. S.* v. *Railroad Co.*, 17 Wall., 322); that Congress cannot impose a tax upon the salary of a judicial officer of a State (*Collector* v. *Day*, 11 Wall., 113); that Congress cannot tax a bond given in pursuance of a State law to secure a liquor license (*Ambrosini* v. *United States*, 187 U. S., 1). A writer of high authority on Constitutional Law has said:

> "There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxa-

> tion is quite as much beyond the power of the National Legislature as if the interference were direct and extreme."
>
> Cooley, Constitutional Limitations, 7th Ed., p. 684 (quoting from *Fifield* v. *Close*, 15 Mich., 505, 509).

In his dissenting opinion in the Peniston case *supra* (quoted with approval by the present Chief Justice in 162 U. S., p. 122), Justice Bradley said:

> "It would be subversive of all our ideas of the necessary independence of the National and State governments, acting in their respective spheres, for the General Government to take the management, control and regulation of State corporations out of the hands of the State to which they owe their existence."

The precise question whether Congress can tax the corporate franchises of a State corporation has not been directly brought before this Court, because Congress has not heretofore attempted anything of the sort. The converse of the question, *i. e.*, whether a State can tax corporate franchises granted by Congress, has, however, been directly passed upon. In *California* v. *Central Pacific R. R. Co.*, 127 U. S., 1, the question was squarely presented. That was an action by the State of California to recover a tax assessed upon all the property and franchises of the defendant. Some of the defendant's franchises had been granted by Congress. The Court held the assessment void because these fran-

chises were included. Justice Bradley, speaking for a unanimous court, discusses the nature and origin of franchises, concluding that a franchise is "a right, privilege or power of public concern" existing and exercised by legislative authority. After enumerating various kinds of franchises, the opinion continues (p. 41):

> "No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise.* * * * In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* v. *Maryland*, 'The power to tax involves the power to destroy.' * * * It seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

This case is squarely in point, unless the rule there enunciated does not work both ways,—unless Congress can tax the franchises of a State railroad company but a State cannot tax the similar franchises of a railroad company chartered by Congress. Such a view would

run counter to the trend of decisions in this court during its entire existence. In the early case of *Chisholm* v. *Georgia*, 2 Dall., 419, Justice Iredell said (p. 435):

> "Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered. Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them; of course the part not surrendered must remain as it did before."

In *The Collector* v. *Day*, 11 Wall., 113, the Court said (p. 124):

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

And again (p. 126):

> "The supremacy of the general government, therefore, so much relied on in the argument of

> the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality."

These views have been reiterated time and again in later cases. Moreover, they have been consistently applied. In *Weston* v. *City of Charleston*, 2 Peters, 449, it was established that a State could not tax the obligations of the United States, because such a tax operated upon the power of the Federal government to borrow money. In *Mercantile Bank* v. *New York*, 121 U. S., 138, 162, the converse was held, *i. e.*, that Congress could not tax the obligations of a State for the same reason. In *Dobbins* v. *Commissioners of Erie County*, 16 Pet., 435, it was held that a State could not tax the emoluments of an official of the United States. In *Collector* v. *Day*, 11 Wall., 113, the converse was held. As a State cannot impose a tax on the property or revenues of the United States (*Van Brocklin* v. *Tennessee*, 117 U. S., 151), so Congress cannot tax the property or revenues of a State or a municipality thereof (*United States* v. *Railroad Company*, 17 Wall., 322).

It will doubtless be urged that the tax in *California* v. *Central Pacific Railroad* was unconstitutional, not merely because it was imposed upon a franchise granted by the General Government, but because the Railroad Company was a governmental agency and performed governmental functions. But the same thing is true of a State public service corporation (like the Coney Island and Brooklyn Railroad Company, defendant in

No. 409). To provide means of transit and intercommunication for its citizens and troops has commonly been regarded as a governmental function of a State. In the exercise of that function Rome built her roads and New York her Erie canal. A State may exercise that function without private co-operation, or it may (and in this age of railways usually does) exercise it by conferring appropriate corporate franchises on individuals, endowing the corporation so formed with the governmental power of eminent domain, and leaving it to do the rest, subject to State supervision.

We submit, however, that the true test (and the test applied in the case cited) is found in *the nature of the function performed by the State in chartering the corporation, not in the nature of the function performed by the corporation after it is chartered.* In the words of the Court, "The power conferred emanates from and is a portion of, the power of the government that confers it." The granting of a charter to an insurance company or other private corporation is as much an emanation of governmental power as is the granting of a charter to a national bank, and the possession or exercise of either is the possession or exercise of governmental power. In other words, *the exercise of the power to grant a charter of incorporation is always a strictly governmental function, whether the corporation so chartered is expected to act as a governmental agency or not.* It is a function peculiar to government or sovereignty and incapable of exercise

by any one else. It is a branch of, or incidental to the law-making power (1 Morawetz, Corporations, Sec. 8). A tax, therefore, on the franchise, or the exercise of the franchise, constitutes an interference with the exercise of a governmental function, irrespective of the character of the corporation which pays the tax.

The rule forbidding taxation by the States of patent rights or copyrights granted by the General Government (*People ex rel. Edison, &c., Co.* v. *Assessors,* 156 N. Y., 417; *People ex rel.* v. *Roberts,* 159 N. Y., 70; *In Re Sheffield,* 64 Fed. Rep., 833; *Commonwealth* v. *Westinghouse &c. Co.,* 151 Pa., 265; *Webber* v. *Virginia,* 103 U. S., 344) would seem to rest on the same reason, though it has not always been clearly recognized by the State Courts. The granting of a patent is an emanation of governmental power and the exercise of a governmental function, and therefore immune from State interference, irrespective of the nature or intended use of the patent itself.

The principle for which we are contending is well summarized in

> Wisconsin Railroad Co. *v.* Price County,
> 133 U. S., 496, 504,

where, speaking of the lack of power in a State to tax property of the United States, the Court says that the exemption

> "is founded upon that principle which inheres in every independent government, that it must

> be free from any such interference of another government as may tend to destroy its powers or impair their efficiency."

That corporate franchises granted by a State are beyond the taxing power of Congress follows from another line of reasoning. Chief Justice Marshall, in words often repeated by this Court, defined the limitations of the taxing power as follows: (*Weston* v. *City Council of Charleston,* 2 Peters 449, 467).

> "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation.
>
> The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission."

Applying the test here proposed,—can it be contended for a moment that the corporate franchise of a state corporation exists "by authority" of the General Government, or is "introduced by its permission"? Congress did not grant the franchise, and cannot amend or revoke it, or regulate its exercise when not employed in inter-state commerce. The Federal Government cannot maintain *quo warranto* proceedings to forfeit a state franchise or oust the possessor thereof. All these powers belong exclusively to the State. Congress undoubtedly can impose on artificial persons the same taxes that it can impose on natural persons. It

can tax the property and business of A. B. C. & Co., a partnership engaged in the business of sugar refining, and its power to impose those taxes is not diminished if A. B. & C. choose to incorporate as the A. B. C. Company. A tax on the corporate franchise, however, goes further and seeks to reach something new,—something which in the case of individuals has no existence at all, —which comes into being only by the exercise of the sovereign power of a State,—which "emanates from and is a portion of, the power of the government that confers it," (127 U. S., 41), and exists during the pleasure of that government. In other words such a tax seeks to reach the corporate life, a thing which Congress did not give and cannot take away, unless by the destructive power of taxation.

A word as to certain specific propositions advanced on behalf of the Government. It is argued in effect that this tax does not constitute an interference with the powers of the States because:

First. It is not upon corporate franchises but upon their use (Government Brief of March, 1910, p. 79).

Second. Such franchises are not, properly speaking, created by the States but "are ultimately and fundamentally created by the persons who decide to take advantage of the law, which merely permits incorporation" (*Id.*, p. 80).

Third. The United States is supreme and the State subordinate. "It does not follow and is not true that

the United States may not by taxation burden or hamper the operation of a State law because a State may not by taxation burden or hamper the operation of a law of the United States" (*Id.*, p. 87).

To the first argument we answer briefly that the tax would seem to be equally an interference with the power of the State which creates the franchises, whether it be construed as a direct tax on the franchises regarded as property, or as an excise tax on their enjoyment regarded as privileges.

To the second argument we answer that it is unsupported by authority and opposed to the decisions of this Court holding that the franchise of corporate capacity is an emanation of sovereignty (*e. g.*, *California* v. *Central Pacific R. R. Co.*, 127 U. S., 1; *Briscoe* v. *Bank of Kentucky*, 11 Peters, 257).

To the third argument we answer, the supremacy of the United States is confined to matters within its sphere under the Constitution. As to powers reserved to the States, *e. g.*, the right to grant charters of incorporation for ordinary business purposes, the States "are as independent of the General Government as that Government within its sphere is independent of the States." (*The Collector* v. *Day*, 11 Wall., 113.)

We proceed to examine briefly certain cases asserted to be at variance with the views above expressed.

It is asserted in the Government's brief of March, 1910 (p. 72), that the proposition that "the tax is not

an infraction of the general power of the States . . . . " was directly involved and necessarily decided in

Railroad Co. *v.* Collector, 100 U. S., 595;
United States *v.* Erie Ry. Co., 106 U. S., 327;
Spreckels Sugar Refining Co. *v.* McClain, 192 U. S., 397.

We dispute this assertion.

The Act construed in the Spreckels case did not single out corporations, but applied to "every person, firm, corporation or company" carrying on the business specified.

In Railroad Co. *v.* Collector, the question of infraction of State power was not raised or discussed by counsel or court. The only question considered was whether the tax on a certain class of companies, measured in part by interest paid on bonds, was laid on the bondholder or on the business. The latter view was adopted, and the Court took occasion to say (p. 596):

> "As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action."

The case in 106 U. S. involved the same question and was to the same effect.

Pacific Insurance Company v. *Soule*, 7 Wall., 433, is claimed to be an authority for the tax on insurance companies. That case upheld a Federal tax on an insurance company measured by a percentage of its premium receipts. The tax was described as "upon the *business* of an insurance company" and was sustained on the ground that it was an excise or duty and not a direct tax. That it was a tax on business, whereas the present tax is not, will be clear from a brief comparison of the two Acts. In the *Soule* case the Act applied not only to "every insurance company" but also to "every association or individual engaged in the business of insurance." (13 U. S. Statutes at Large, 276.) The present Act applies only to artificial persons. Moreover, large classes of artificial persons are expressly exempted. For example, fraternal beneficiary societies, orders and associations operating under the lodge system, which corporations, as is well known, do a very large part of the insurance business of the country. In the *Soule* case the income taxed was income received from the insurance business. The present Act taxes income "from all sources." In the *Soule* case a particular business was selected for taxation. The present Act taxes all artificial persons indiscriminately, regardless of the kind of business transacted. It is clear, therefore (for the reasons discussed in Point I, *supra*), that the tax involved in the *Soule* case was of a different nature from the tax now before the

Court and that the case affords no precedent for this tax.

Veazie Bank v. *Fenno,* 8 Wall., 533 (which upheld the statute taxing out of existence the circulation of the State banks), has been asserted to sustain the right of Congress to levy a tax upon a franchise or privilege granted by a State. It is true that in that case the eminent counsel for the bank (Messrs. Reverdy Johnson and Caleb Cushing) argued unsuccessfully "that the act imposing the tax impaired a franchise granted by the State, and that Congress had no power to pass any law which could do that" (see 8 Wall., p. 535), and that two justices dissented on that ground. The conclusive answer to this argument was, however, that the power of the States to grant the particular right or privilege in question was subordinate to powers expressly conferred on Congress by the Constitution; that Congress was given power under the Constitution to provide a currency for the whole country, and the Act in question was legislation appropriate to that end. The case does not hold that Congress has any general power to tax franchises or privileges granted by a State. The decision was expressly put on other grounds, and the remarks of the Chief Justice on the taxation of franchises (found at p. 547 and quoted in the Government brief) are merely dicta.

Knowlton v. *Moore,* 178 U. S., 41 (the Federal Inheritance Tax case), has also been asserted to be an authority for the right of Congress to tax a privilege

granted by a State. It is true that in that case the Court discussed and overruled the contention that Congress cannot impose an inheritance tax because inheritances are regulated by State law. The Court, however, concluded, after an exhaustive examination of the subject, that the tax did not fall on any privilege from the State. An inheritance tax falls on the transmission or transfer. As Mr. Justice White, writing for the Court, said (p. 59):

> "The fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."

The transmission or transfer is not a privilege granted by a State, but necessarily follows and results from the fact of death. A man dies and his property perforce passes from him. That is the transmission. The State does not originate it, but merely prescribes the channels in which it shall flow. This right of regulation is not the subject of the tax. The tax would be due, like the tax upheld in the *License Tax Cases* (5 Wall., 462), if there was no regulation whatever.

South Carolina v. *United States*, 199 U. S., 437 (the

South Carolina Dispensary case), has been asserted to be an authority for the right of Congress to tax the exercise of powers or functions by a State. The powers and functions in question, however, were not of a governmental character. Moreover, the case does not touch at all the question of the right of Congress to tax franchises granted by a State. The tax which was upheld was a tax upon the business of selling liquor. The right to sell liquor is not a franchise granted by a State any more than the right to sell boots, though the State in the exercise of the police power may regulate the business or even take it over altogether and conduct it through agents of the State. South Carolina had done this, and the question in the case was as to the right to tax a State agency. The question of the right to tax a franchise or privilege from the State was not involved. The Court held that the State could not, by taking over a private business, deprive the Federal Government of a right of taxation which had always existed, pointing out that otherwise "it would be within the competency of the States practically to destroy the efficiency of the National Government."

This Court in both the cases last cited lays much stress on the historical argument, *i. e.*, that the power of Congress to impose the taxes in question had been conceded from the foundation of the Government and frequently exercised. The tax now before the Court, on the contrary, is an innovation of the year 1909.

We are not contending here (as were appellants

in the Inheritance Tax case and the South Carolina Dispensary case), in favor of any right or power of a State to narrow the field of Federal taxation or withdraw from the taxing power of Congress any subject matter over which that power has ever been exercised. On the contrary we are resisting an attempted encroachment by Congress on an entirely new field, created by and heretofore reserved exclusively to the separate States. Congress can tax a property and business owned by individuals. It can tax the same property and business when owned by a corporation. The act of the State in clothing the individuals with corporate franchises withdraws no source of Federal revenue. Does it on the contrary create a new subject matter for taxation by the General Government? That is the proposition involved in the claim of a right in Congress to tax corporate franchises granted by a State. We submit that there is no ground for such a claim, either in reason or in precedent.

The Tax Cannot Be Sustained as a Tax on Franchises as Property.

It may be urged, in reliance on certain dicta in *Veazie Bank* v. *Fenno*, 8 Wall., 533, 547, that the tax is imposed on franchises, not as privileges from the State, but as *property*.

We do not think the Act is open to that construction. There is no provision for ascertaining the value

of the franchises as property, either by appraisement or otherwise.

Even if the Act were to be so construed, however, appellees would be in no better position, because:

(*a*) The fact that a tax is on property does not render it constitutional if it nevertheless involves an interference with sovereign powers or instrumentalities of a State. The tax involved in *U. S.* v. *Railroad Co.*, 17 Wall., 322, was a property tax, but that fact did not save it.

(*b*) If the tax is on franchises as property it is a tax imposed on real or personal property, and is void under Article I, Sections 2 and 9, of the Constitution, as being a direct tax not apportioned according to population.

Pollock *v.* Farmers' Loan & Trust Co.,
157 U. S., 429.
On Rehearing, 158 U. S., 601.

The Principle Menaced by the Claim of a Right in Congress To Tax the Franchises of State Corporations, and the Practical Consequences if Such a Claim Be Upheld.

The amount of the present tax is not large when compared with the aggregate assets of the artificial persons on which it is laid. The principle involved, however, is fundamental and vital. It touches the right of each State under the compact evidenced by

the Federal Constitution to manage its internal affairs free from compulsion or interference by the other States.

In some parts of the country the anti-corporation feeling runs high. Many men, both in Congress and out, if given their way would tax the larger corporations out of existence. If this Act is upheld in principle the way is open whenever these men can secure a majority in Congress. An increase in the tax rate is all that would be necessary. Make the rate ten per cent. or twenty per cent. instead of one per cent. and the thing is accomplished.

New York may deem it good policy to encourage the carrying on of industry in a corporate form. Texas may take a different view and conclude that the solution of the Trust problem lies in suppressing certain classes of corporations altogether. If the principle of this Act is upheld it will be within the power of Texas and her associates in Congress to impose their views on New York and make it impossible for her domestic industries to be carried on profitably in a corporate form. The possibility of so impressing the will of one State or group of States upon another State with respect to her internal affairs is the very thing which the founders of the Government sought most carefully to avoid. Had it been supposed that the grant of taxing powers to the General Government involved such a curtailment of State independence it is doubtful, to say the least, whether enough States would have consented to ratify the Constitution.

POINT III.

If the tax be construed as an income tax it is unconstitutional (a) because imposed upon income from real estate and personal property, and therefore a direct tax not apportioned among the states according to population; and (b) because imposed upon income from state and municipal securities and therefore a burden on the borrowing power of the states. As these are essential and inseparable parts of the taxing scheme, the tax must fall as a whole.

The Act provides

> "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company * * * shall be subject to pay annually a [*special excise*] tax [*with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company,*] equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year," etc.

Strike from the Act the words which we have bracketed and it becomes clearly an income tax (if it is not a corporate franchise tax). Can the addition

of those words be said to change the nature of the tax? They are merely words of description or characterization, in no wise affecting any of the substantive features of the tax. And as already seen (Point I *supra*), the nature of the tax depends upon its substantive features —not on what the legislature has seen fit to call it. "It is the substance and not the form which controls." (157 U. S., 581.)

It will be illuminating to compare the tax with the corresponding features of the act declared unconstitutional in the Pollock case. Section 32 of that act (28 Stat., 509, 556, c. 349), provided

> "That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all * * * corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships."

Comparing the provisions just quoted with the Act now under consideration it will be seen that while they differ in phraseology the only difference in substance is that the Act of 1894 imposed a tax of two per centum "on the net profits or income" of corporations, while

the present tax is "equivalent to one per centum upon the entire net income over and above five thousand dollars." The fatal characteristic of the Act of 1894 as found in the Pollock case was that it imposed without apportionment a tax on persons "solely because of their general ownership of property." (Knowlton *vs.* Moore, 178 U. S., 41, 82.) That characteristic pervades every feature of the present Act and is intensified by the addition of the word "entire."

We assume that if this court construes the tax as an income tax it will feel itself constrained to follow the decision in the Income Tax cases. (Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429; 158 U. S., 601.) We deem it unnecessary, therefore, to discuss the considerations on which that decision was based. No case ever received more thorough or exhaustive consideration. It has been frequently cited as authority in later decisions of this court and has been acquiesced in by the country at large. The method of providing for a valid Federal income tax which it pointed out (viz.: by constitutional amendment) is actually being pursued. Such a constitutional amendment has been proposed by Congress (see Joint Resolution of Congress, p. 185 of Statutes of 1909) and is now before the State legislatures for ratification. Under these circumstances the questions involved in the Income Tax cases may well be considered as definitely and finally settled.

It only remains to point out that the corporations

involved in the cases in which this brief is filed (Nos. 409 and 410) derive income from sources which bring them squarely within the decision in the Pollock case. The Home Life Insurance Company (Appellee in No. 410) has many millions of dollars invested in real and personal property and in Government, State and municipal securities, and derives a large income from such investments.

See Record, p. 2, fol. 3.

The Coney Island and Brooklyn Railroad Company (Appellee in No. 409) derives substantially its entire income from the use of real and personal property, and the exercise of franchises which by the laws of the State of New York are defined to be real estate.

See Record, p. 5, fols. 9, 10, Laws of New York 1909, Chap. 62, Sec. 2.

That the inclusion of these objects in the taxing scheme of 1894 rendered the whole scheme void was one of the points decided in the Pollock case. The court considered that the scheme must be regarded as a whole and that the provision for a tax on the income from real and personal property formed a vital part of it. The same reasoning, we submit, applies to the present Act. This Act contemplates a tax upon the entire net income of corporations and joint stock associations derived from all sources. The amount of income derived by corporations—notably insurance

companies—from real estate and invested personal property is very large, and the taxation of this income is as vital a part of the present scheme as it was of that of 1894. If this were deducted a large part of the anticipated revenue would be eliminated and the tax would cease to be upon the entire net income as contemplated by Congress. A tax upon net income received from all sources except from invested capital and surplus is very different in operation and effect from a tax upon entire net income from all sources.

POINT IV.

The tax ordained by the Act is non-uniform, arbitrary and unequal, and if imposed and enforced would deprive the corporations and joint stock associations against which it is levied of their property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution.

That Congress may impose an excise tax upon the carrying on of a particular business is, of course, well established. Of this character was the excise imposed upon the insurance business and upheld in *Pacific Insurance Co.* vs. *Soule,* 7 Wall., 433, and that imposed upon the refining of sugar and petroleum and upheld in *Spreckels Sugar Refining Co.* vs. *McClain,* 192 U.

S., 397. The taxes considered in both of those cases, however, were exacted from all persons, co-partnerships and corporations engaged in the particular business excised and there was, therefore, no element of arbitrariness or inequality contained in the Acts imposing them. In addition to these Congress has at various times passed numerous other Acts imposing excise taxes upon selected and classified occupations, callings or privileges, none of which, however, bore any resemblance to the present Act. Here, for the first time, we have a tax claimed to be an excise which is levied upon every conceivable business, occupation or calling in which any individual, co-partnership, joint stock association or corporation may engage, but limited to those only who carry on such business in joint stock or corporate form. The result is to impose upon one competitor in a particular line of business a burden that is not imposed upon another engaged in the same line, with the ultimate effect of compelling the discontinuance of the business discriminated against, which could only be carried on under such circumstances at a ruinous disadvantage.

Undoubtedly Congress may classify the objects of taxation, but such classification must be reasonable and must be based upon characteristics which differentiate persons and objects within the class from those who are omitted and it must include all who are within the principle upon which it is based. No classification, we submit, could be more unreasonable, arbitrary or vi-

cious than one which includes, for the purpose of taxation, some members of a class engaged in a competitive business and excludes others of the same class. The result of such a classification must be to favor some at the expense of others and violate the principle of equality which lies at the basis of all just legislation. In *Cooley on Taxation,* at page 259, it is well said:

> "Inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. Such a restricted tax might, on the other hand, under some circumstances, be as equal and just as any that could be laid. A tax laid exclusively on merchants' goods might not be burdensome to those who, in the first instance, paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the State. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made; whether it be because of residence in a partic-

> ular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies; as if loans of money were in general taxed, but those made by named persons, or by residents of a named locality, were exempted; in which case the injustice would be so manifest that none could defend it."

If Congress may impose an exclusive tax upon corporations and joint stock associations with respect to the carrying on of a business which others may engage in upon equal terms, why may it not impose a like tax upon single men, women, foreign born citizens, or red-haired men? If the principle of arbitrary selection be once allowed, who can set bounds to its exercise?

And not only are corporations and joint stock associations arbitrarily selected for taxation, but some corporations are as arbitrarily exempted. Thus the Act exempts fraternal benefit societies, orders or associations operating under the lodge system, and domestic building and loan associations.

The enormous business done by the last-named associations is well known. Their profits are greater than those of the average bank, trust company or sav-

ings institution. They are in no sense public, charitable, religious or benevolent associations. They engage in business solely for the profit of their members and they compete directly with savings banks, trust companies and insurance companies in the loaning of money. Why should the latter be taxed and they exempted? What is there in their business that justifies a discrimination in their favor as against savings banks and mutual insurance companies? Referring to the exemption of these associations in the Income Tax Act of 1894, Mr. Justice Field in the Pollock case said (p. 598):

> "The property of these institutions is exempted from taxation to the extent of millions. They are in no sense benevolent or charitable institutions, and are conducted solely for the pecuniary profit of their members. Their assets exceed the capital stock of the national banks of the country. * * * The census report submitted to Congress by the President, May 1, 1894, shows that their property in the United States amounts to over $628,000,000. Why should these institutions and their immense accumulations of property be singled out for the special favor of Congress, and be freed from their just, equal and proportionate share of taxation, when others engaged under different names, in similar business, are subjected to taxation by this law?"

So with fraternal benefit associations doing business under the lodge system. How do they differ in

principle from mutual life insurance associations? Both exist for the benefit of their members and neither is more benevolent or beneficial to society than the other. They are in constant competition everywhere for business, and yet one is taxed on the business it does and the other exempted. To quote again from the opinion of Mr. Justice Field in the Pollock case (p. 595):

> "Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the legislature to exempt them. (Citing cases.) Cooley in his treatise on Taxation (2d Ed., 215), justly observes that 'It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation."

Nor do the unequal, arbitrary and discriminating features of the Taxing Act end here or affect corporations and joint stock associations alone as a class, but they are also to be found within the selected class it-

self. We call attention to three of them that directly affect the defendant corporations in these cases.

1. The tax, although purporting to be a tax on the doing of business is not limited to the income derived from the business done, but is imposed upon, or calculated according to, the entire net income over and above Five thousand dollars, received by the owner, from all sources whatsoever. The result is that if one corporation derives a net income of $100,000 wholly from a business carried on by it and another carrying on a business of the same kind and making an equal profit, receives an additional income of $100,000 from investments which may be in State or United States bonds, exempt from taxation, one is taxed one thousand dollars and the other two thousand for the exercise of exactly similar privileges with exactly similar results.

Of the victims of this discrimination, defendant Home Life Insurance Company is one. It has over $16,000,000 invested in interest bearing securities, upwards of $1,100,000 of which consists of undivided profits; and these investments, to the extent of several hundred thousand dollars are in State, Federal or municipal securities (Record, p. 2, fol. 3). If any part of the interest derived from these investments can be said to be income from business that cannot be said of the interest from the $1,100,000 of undivided profits, and yet the company is required to pay the same tax upon this latter as upon the earnings from its business.

2. The Act provides for a deduction from the gross income received by the corporation or joint stock association taxed, on account of interest paid on its bonded or other indebtedness, up to the amount of its capital stock, and no more. The result is, that if one corporation has $1,000,000 of capital and $1,000,000 of indebtedness, upon the latter of which it pays interest at the rate of four and one-half per cent., and makes in a given year a profit over operating expenses of $50,000, it has no tax to pay because it is allowed a deduction on account of the $45,000 paid as interest on its indebtedness, while another corporation doing the same amount of business and making the same profit above operating expenses is compelled to pay tax on $45,000 of its gross income if it happens to have a capital stock of only one hundred thousand and an indebtedness of eleven hundred thousand upon which it pays the same rate of interest. In other words, a corporation in the situation last supposed is compelled to pay a tax not upon its net income—for it has none—but upon the interest of what it owes. This feature of the Act operates directly against defendant, The Coney Island and Brooklyn Railroad Company. That Company has a capital of $2,983,900 and an indebtedness of $3,700,000 (Record, p. 3, fol. 5), making a difference of $716,100. On its indebtedness it pays interest at the rate of four per cent., which on $716,100 amounts to $28,644. It is required by the Act to pay

a tax on its total net income, and on this $28,644 besides.

3. The Act requires corporations and joint stock associations to pay a tax on their *entire* net income received from all sources and so compels a corporation or joint stock association doing business both here and abroad to pay a tax upon the income of its foreign business for the privilege of doing its business here, notwithstanding that its domestic business may be less than five per cent. of its total business. That the effect of this is a discrimination against the larger life and fire insurance companies is apparent. These companies, as is well known, do a world business. In the United States and its dependencies they compete everywhere with the foreign insurance companies. The latter, however, by the terms of the Act are only required to pay a tax on their net income derived from the business they do in this country, while the domestic companies, for the privilege of doing the same business, are compelled to pay a tax on their foreign business, which in some cases may be so large as to make it impossible for them to compete successfully here with their foreign rivals.

In *People* vs. *Mensching*, 187 N. Y., 8, the New York Court of Appeals had before it an Act imposing a tax on transfers of stock of domestic and foreign corporations calculated at the rate of two cents "on each share of $100 of face value *or fraction thereof*." The Act was held unconstitutional because

the tax imposed did not operate alike on all stocks, but, without any basis for classification, bore heavily on some stock and lightly on other stock. The Court said (pp. 18, 21):

> "While the legislature has wide latitude in classification its power in that regard is not without limitation. * * * While the State can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. * * * Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation, and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their

> personal and civil rights.' (Citing cases.) By the statute before us the tax is laid upon sales, and the class of sales taxed consists of corporate shares, but all members of the class are not treated alike, since one is taxed many times as much as another, although worth no more. Two corporations may be doing the same kind of business upon the same amount of capital, with assets of the same value, and shares aggregating the same face value, but if a share in one has but half the face value of a share in the other, still the sale of the same number of shares in each would be taxed the same amount, in manifest disregard of justice and principle. * * * This is not classification, but arbitrary or accidental selection. The statute breaks into the class, and with eyes shut strikes some, and lets others go. The rule governing the subject as laid down by the Supreme Court of the United States, is that there must be 'some difference which bears a reasonable and proper relation to the attempted classification.' It cannot be 'mere arbitrary selection.' "

If these various arbitrary selections and discriminations are permissible, what is to hinder a majority of Congress from destroying any or all State corporations, or any or all State franchises, at its mere will or whim? And if this can be done, what do constitutional guaranties amount to and what is to become of the reserved rights of the States? We earnestly protest that Congress has no such arbitrary power; that

the existence of such a power would be in conflict with the fundamental principles upon which our government was established; that the first ten amendments to the Constitution were adopted for the very purpose of safeguarding the States against the attempted exercise of such a power, and that the provisions of the Fifth Amendment declaring that "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation," furnish ample protection against its attempted exercise in a case like the present.

Hamilton, writing for the *Continentalist,* said:

> "The genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the State demands; whatever liberty we may boast of in theory, it cannot exist in fact while (arbitrary) assessments continue." (1 Hamilton's Works, Edition 1885, 270.)

Speaking upon the same subject, Mr. Justice Field, in the Pollock case, said (p. 599):

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of

a tax. This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress."

In Dillon on Municipal Corporations at Section 736, it is said:

"Equality, indeed, so far as practicable, is inherent in the very idea of a tax, as distinguished from arbitrary exaction."

At Section 737, it is further said:

"Taxation * * * implies that the imposition shall be upon some system of apportionment, so as to secure uniformity among those who are, or ought to be, subject to the particular tax or assessment; and hence we may readily conceive of acts of the legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the Constitution should be infringed."

In Desty on Taxation at Section 10, it is said:

"Equality in the imposition of the burden is of the very essence of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule tending

> to that end is indispensable. * * * Where property is taken from the citizen by the sovereign will and appropriated without his consent, to the benefit of the public, the exaction should not be considered as a tax unless similar contributions are exacted from such constituent members of the same community generally as own the same kind of property. * * * A tax may be a capitation or a property tax, direct or indirect, *ad valorem* or specific, and though it may not be universal, yet it must be general and uniform."

In *People* vs. *Salem*, 20 Mich., 452, the Supreme Court of Michigan held a statute invalid, as not within the taxing power, irrespective of any constitutional limitations. In discussing the subject, the Court said (Cooley, J., p. 473):

> "It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words. * * * I understand that, in order to render valid a burden imposed by the Legislature under an exercise of the power of taxation, the following requisites must appear. * * * 2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so

that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. * * * Equality in the imposition of the burden is of the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. * * * The principles here stated are fundamental maxims in the law of taxation. They inhere as conditions in the power to impose any taxes whatsoever, or to create any burden for which taxation is to provide; and it is only when they are observed that the legislative department is exercising an authority over this subject which it has received from the people, and only then is that supreme legislative discretion of which the authorities speak called into action."

In *State* vs. *Township of Readington*, 36 N. J. L., 66, 70, Depue, *J.* (afterwards Chief Justice), said:

"A tax upon the persons or property of A, B and C, individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is, to the extent of such excess, the taking of private property for a public use without compensation. The process is one of confiscation and not of taxation."

In *State* vs. *Mayor of Newark*, 37 N. J. L., 415, 421, Beasley, C. J., said:

> "I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation, is not a limited right. * * * If such prerogative has no trammel or circumscription, then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon specified property, does not exist."

In *Durach's Appeal*, 62 Pa. St., 491, 494. Sharswood, *J.*, said:

> "There is no limitation of these powers" (*i. e.*, the power of taxation by municipal governments) "expressed in the constitution of Pennsylvania as there is in the constitutions of some of our sister States; but, nevertheless, there are limits in the nature of things. The Legislature cannot, under the name of taxation, take private property for public use without making compensation, and a special tax levied upon an individual, or upon particular individuals, would infringe this restriction."

As is well understood, the Due Process clause of the Fifth Amendment is an adaptation of the provisions of Magna Charta guaranteeing Englishmen against the deprivation of life, liberty or property except by the judgment of their peers and the law of the land.

"Due Process of Law" and "The Law of the Land," therefore, mean the same thing in constitutional law, and as remarked in *Bank of Columbia* vs. *Okely*, 4 Wheat., 235, 244:

> "After volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the *arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*" (Italics ours.)

The term Due Process of Law is also to be found in the Fourteenth Amendment and Mr. Justice Field speaking of it in that connection in the *Santa Clara Tax case*, 9 Sawy., 170, 187, said:

> "The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation levelled against

special classes has been the fruitful means of oppressions, and the cause of more commotions and disturbances in society, of more insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel, in the *San Mateo* case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read as contended it does in law—'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation*—nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*' No such limitation can be thus engrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation, without due process of law, is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

In *Loan Ass'n* v. *Topeka*, 20 Wall., 655, 663, the Court said:

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. * * * The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief

Justice Marshall, in the case of *McCulloch* v. *The State of Maryland,* that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."

In *Gulf, C. & S. F. Ry. Co.* v. *Ellis* 165 U. S., 150, 154, 159, it is said:

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. (Citing cases.) The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens. But it is said that it is not within the scope of the Fourteenth Amendment to withhold

from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis."

* * * * *

"Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo *v.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and ac-

tion of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits or right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. *No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.*" (Italics ours.)

The latest reported utterance of this Court on the subject is found in *Southern Railway Co.* v. *Greene,* 216 U. S., 400.

In that case it was held that a statute of Alabama imposing a tax on a foreign corporation authorized to do business in the State which was not imposed on domestic corporations owning the same character of property and carrying on the same kind of business was unconstitutional as in violation of the equal pro-

tection clause of the Fourteenth Amendment. Mr. Justice Day said (p. 417):

> "It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

If the tax involved in these cases be not a corporate franchise tax, but a tax on business or occupation as claimed by the Government, it is difficult to see why the

imposition of the tax upon corporations and the exemption of partnerships and individuals owning the same character of property and carrying on the same kind of business is not equally arbitrary.

POINT V.

Whatever view may be taken of the Act in its other aspects, it must be held unconstitutional, so far as it imposes a tax on the franchises or business of State railroads or other public service corporations, because an interference with State agencies or instrumentalities.

The franchises of intra-state railroad corporations (like appellee, The Coney Island and Brooklyn Railroad Company), are conferred by a State for public purposes. These corporations are formed, in part at least, for the purpose of aiding the State in the discharge of a governmental function, viz., to provide means of transit and inter-communication for its citizens and troops. Their business is of a public character, subject to regulation by the State in the public interest and not to be abandoned without the State's consent. They are controlled or are controllable in all their operations by the State, which has the right, not infrequently exercised, of fixing the rates they

shall charge and prescribing in detail the service they shall render. In exercising the power of eminent domain, they exercise a power and perform a function of the State which charters them. The exercise of this power is part of their business. With some of them it doubtless constituted a part of the business transacted during the year ending December 31, 1909, which is what the Act purports to tax.

Conceding the right of the General Government to tax the *property* of these corporations as distinguished from their franchises or business (Railroad Company *v.* Peniston, 18 Wall., 5), it is not perceived how Congress can tax their franchises or business without violating the well-established principle that neither the General Government nor a State can tax the agencies or instrumentalities of the other.

The South Carolina Dispensary case (South Carolina *v.* United States, 199 U. S., 437) is authority for the proposition that a business private in its nature is not taken out of the field of Federal taxation merely because a State sees fit to engage in it. Conversely, we submit, a function or business governmental in its nature is not thrown into the field of Federal taxation merely because a State entrusts its exercise to a railroad company or other public service corporation.

We have insisted and we still insist that *California* v. *Pacific Railroad Co.*, 107 U. S., 1, is authority for the proposition that Congress cannot tax any franchise granted by the State for either public or so-called pri-

vate purposes. If this be denied it will hardly be denied that the case is authority for the proposition that Congress cannot tax a State corporation existing as an agency of the State, nor do we think it can be successfully claimed that the railroad in the case mentioned was a Federal agency in any other sense than a State railroad in the State of New York is an agency of that State.

POINT VI.

The fact that insurance companies are specifically mentioned in the act does not differentiate them from the other corporations subject to the tax or indicate that as to them the tax falls on business or occupation.

The assertions to the contrary in the briefs of our opponents are, we submit, clearly mistaken. The Act imposes a tax on corporations and associations "having a capital stock represented by shares *and every insurance company.*" Obviously the insurance companies are specifically named because otherwise the large class of such corporations doing business on the mutual plan without capital stock represented by shares would escape the tax.

In *Pacific Insurance Co.* v. *Soule*, 7 Wall., 433, the situation was entirely different. The tax imposed in that case had all the features lacking here of an excise

tax on business or occupation; *i. e.*, not only was a particular business singled out for taxation, but the tax was imposed on "every association or individual engaged in the business of insurance" as well as on "every insurance company," and was measured not by income from all sources but by receipts from the business taxed (13 U. S. Statutes at Large, 276).

Were there opportunity on this appeal to discuss the Act on economic and moral grounds as well as in its strictly legal aspects, it could readily be demonstrated that of all the features of the Act the tax on life insurance companies doing business on the mutual plan is the most indefensible. The net income of such corporations is not, properly speaking, profits but represents for the most part the "loadings" of premiums in excess of the mathematical cost of insurance, exacted of the policy holders for reasons of prudence and safety in the conduct of the business. These loadings belong equitably to the policy-holders, who contributed them and are entitled to receive them back from time to time in what, for want of a better name, have been called dividends. A tax which does not allow for the deduction of these so-called "dividends" is an addition to the cost of insurance and falls on the income of the people of small means who make up the great body of policyholders.

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Of Counsel for Appellants.

APPENDIX.

SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock

companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a rea-

sonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided,* That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and

necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it

within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its prin-

cipal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company, at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and proper-

ties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other in-

debtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith

by the collector to the Commissioner of Internal Revenue.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter

required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect,

or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. ~~754~~. 409

Office Supreme Court U. S.
FILED
MAR 11 1910
JAMES H. McKENNEY, Clerk.

WYCKOFF VANDERHOEF,
Appellant,

vs.

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY ET AL.,
Appellees.

BRIEF FOR APPELLEES.

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SYNOPSIS OF BRIEF.

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" 3 Preliminary Points.

Equitable Jurisdiction not disputed.

The Income Tax Cases not questioned.

" 4 Point I. The tax is not an interference with the sovereign powers of states.

" 16 Point II. The tax, even if in some respects an income tax, is not a direct tax.

" 25 Point III. The tax is "uniform" and does not deprive of property without due process of law.

" 28 Point IV. A tax upon franchises or business of public service corporations is not an interference with governmental functions of the States.

" 32 Point V. The tax, even if unconstitutional in some respects, is valid in the main.

Supreme Court of the United States,

OCTOBER TERM, 1909. No. 751.

WYCKOFF VANDERHOEF,
Appellant,

v.

THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, ET AL.,
Appellees.

BRIEF FOR APPELLEES.

The statement of facts in this case given in appellant's brief fairly sets forth the matters alleged in the bill of complaint in this suit, which must be taken to be admitted by the demurrer interposed by defendants Coney Island and Brooklyn Railroad Company, and its officers and directors.

The principal defendant, Coney Island and Brooklyn Railroad Company, hereinafter referred to as "defendant" is an electric street railway corporation incorporated under the laws of the State of New York and engaged solely in the business of carrying passengers for hire within the State of New York. It does not appear from the record in this suit, nor is it the fact,

that defendant performs any functions or duties of a public or municipal nature, other than those of an ordinary street railway company. It is under no contract with or obligation to the State of New York or any municipality or subdivision thereof, to transport troops, militia, or property for state or municipal purposes, except as it may be bound to accept such persons or property in its capacity as a private corporation engaged in the business of a carrier for its own profit and advantage.

Nor is it the fact, nor is it shown by the record in this suit, that defendant owns or holds any stocks, bonds or other evidences of indebtedness of any state or political or municipal division thereof, from which it derives any part of its income.

Defendant, through its officers and board of directors, believing the tax imposed by section 38 of "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for other Purposes," approved August 5, 1909, to be constitutional and rightfully imposed, and having been so advised by its counsel, announced its intention of filing the return required by Subdivision Third of section 38 of the Act and of complying with all its other provisions.

PRELIMINARY POINTS.

Equitable Jurisdiction.

As this suit is similar in nature and procedure to the Income Tax Case,

Pollock vs. Farmers' L. & T. Co. (157 U. S., 429),

it is assumed that this Court will entertain the appeal. No question, therefore, is raised as to the equitable jurisdiction of the Circuit Court or of this Court.

The Income Tax Cases.

Whether or not this Court would modify or overrule its decision in the Income Tax Cases

Pollock vs. Farmers' L. & T. Co. (157 U. S., 429, 158 U. S., 601)

if the questions there considered were again presented, is an entirely unnecessary consideration in this case. Neither those cases nor their logical consequences and deductions are opposed to the validity of the present tax. In fact, the position of these appellees actually obtains support from the reasoning of both the prevailing and dissenting opinions in those cases.

No doubt in view of the difference of opinion among the learned Justices of this Court, and of the fact that none of the prior cases cited by the court were overruled except as to *dicta*, the authority of the decision in the Income Tax Cases will be limited strictly to the facts there presented, but even this, it is submitted, is not essential to sustain the validity of the tax in question.

The various objections set forth in appellant's specification of errors will be taken up, so far as possible, *seriatim*.

POINT I.

The tax in question does not involve an unconstitutional interference with the sovereign powers and functions of the states.

At the outset it is to be noted that the tax is laid not only upon corporations but also upon *joint stock companies and associations* organized for profit and having a capital stock represented by shares.

The distinction between corporations and joint stock companies and associations is too well understood to require discussion here. The following cases clearly show these distinctions:

Chapman vs. Barney (129 U. S., 677).
Peo. ex rel. vs. Coleman (133 N. Y., 279).
Phillips vs. Blatchford (HOLMES, J.), (137 Mass., 510).

The fact that such joint stock companies and associations are taxed as well as corporations shows, of course, that it was not the intention of Congress to tax merely corporate franchises, *i. e.*, the rights of corporate existence derived directly from the States, but it is not necessary to rely upon the distinction between corporations and joint stock companies; and *even if corporations alone* were included in the Act, the tax would not be an interference with the sovereign powers and functions of the State.

Counsel for appellant admit that this Court has never decided that Congress may not tax the corporate franchises of a State corporation. We agree; and confidently predict that this Court never will make such a decision. Certainly there is nothing in the written Constitution of the United States to prevent such a tax; nor is there anything in the unwritten implied restrictions upon the powers of the Federal Government arising from the dual nature of the system of government in this country. These restrictions have been carefully

guarded and upheld by this Court ever since its creation but they have properly been confined to matters which have to do with the *strictly governmental powers and functions of the several States.* On this point we need add nothing to the following abstract from a recent opinion of this Court written by Mr. Justice BREWER in the case of

South Carolina vs. United States (199 U. S., 437, 454, 459).

(page 459)

" It is also worthy of remark that the cases in which the invalidity of a Federal Tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the State, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the State, in the discharge of its ordinary functions as a government.

" In *Veazie Bank v. Fenno*, 8 Wall., 533, in which a National tax of ten per cent. on the amount of notes of any person, state bank, or banking association, used for circulation, was sustained, the court thus stated the limits of the power of National taxation over state agencies (p. 547) :

' It may be admitted that the reserved rights ' of the States, such as the right to pass laws, ' to give effect to laws through executive action, ' to administer justice through the courts, and ' to employ all necessary agencies for legitimate ' purposes of State government, are not proper ' subjects of the taxing power of Congress.'

In *The Collector v. Day*, 11 Wall., 113, cited *supra*, in the argument in favor of the exemption of the salary of a State judge from national taxation, is this language (p. 125) :

' It would seem to follow, as a reasonable, if ' not a necessary consequence, that the means ' and instrumentalities employed for carrying ' on the operations of their governments, for ' preserving their existence and fulfilling the ' high and responsible duties assigned to them ' in the Constitution, should be left free and ' unimpaired, should not be liable to be crip-

'pled, much less defeated by the taxing power
'of another government, which power acknowl-
'edges no limits but the will of the legislative
'body imposing the tax. And, more especially,
'those means and instrumentalities which are
'the creation of the sovereign and reserved
'rights, one of which is the establishment of
'the judicial department, and the appointment
'of officers to administer their laws. Without
'this power, and the exercise of it, we risk
'nothing in saying that no one of the States
'under the form of government guaranteed by
'the Constitution could long preserve its exist-
'ence.'

In *United States v. Railroad Company*, 17 Wall., 322, an attempt was made to collect a tax on money due from a railroad company to the City of Baltimore. It was held that the City was a portion of the state in the exercise of a limited portion of the powers of the State and the Court said (p. 327):

'The right of the States to administer their
'own affairs through their legislative, executive,
'and judicial departments, in their own manner,
'through their own agencies, is conceded by the
'uniform decisions of this court and by the
'practice of the Federal Government from its
'organization. This carries with it an ex-
'emption of those agencies and instruments
'from the taxing power of the Federal Govern-
'ment.'

" And again (p. 332):

'We admit the proposition of counsel that
'the revenue must be municipal in its nature to
'entitle it to the exemption claimed. Thus, if
'an individual should make the City of Balti-
'more his agent and trustee to receive funds
'and to distribute them in aid of science,
'literature, or the fine arts, or even for the re-
'lief of the destitute and infirm, it is quite
'possible that such revenues would be subject
'to taxation. The corporation would therein
'depart from its municipal character and as-
'sume the position of a private trustee. It
'would occupy a place which an individual
'could occupy with equal propriety. It would
'not in that action be an auxiliary or servant of
'the State, but of the individual creating the

'trusts. There is nothing of a governmental 'character in such a position.'

In *Ambrosini v. United States*, 187 U. S., 1, in which the Federal war revenue tax act, providing for stamp taxes on bonds, was held inapplicable to bonds required from licensees under the dram shop act of Illinois, the court declared (p. 8):

'The question is whether the bonds were 'taken in the exercise of a function strictly be- 'longing to the state and city in their ordinary 'government capacity, and we are of the opin- 'ion that that they were, and that they were 'exempted as no more taxable than the licenses.'

These decisions, while not controlling the question before us indicate that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

(The Court here proceeds to discuss numerous decisions of the State Courts showing the distinction between governmental and *quasi* private functions and instrumentalities of the States.)

(page 454):

"More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government?

"We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities,

consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

" Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National government."

In addition to the cases cited in the foregoing opinion as showing the distinction between the governmental and *quasi* private functions and instrumentalities of the State, may be cited a recent important case in the New York Court of Appeals.

Matter of Rapid Transit Commissioners (197 N. Y., 81.) The Court says, per VANN, J., at page 96 :

" 1. Was the action of the city in building the subway governmental or proprietary in character?

" The city owns the subway, and it is a railroad corporation so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted to build and operate the road. It is authorized to lease its railroad, either for ' a specified sum of money or a specified proportion of income, earnings or profits ; ' or it may operate the road itself, and charge such rates of fare for the transportation of persons and property as may be fixed by its own boards and officers (§§ 27 and 30). In other words, the subway is a

business enterprise of the City, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a proprietor, not as a sovereign (*Maxmillian v. The Mayor*, 62 N. Y., 160 ; *Messano v. The Mayor*, 160 N. Y., 123 ; *South Carolina v. The United States*, 199 U. S., 437)."

Following the reasoning of the *South Carolina case* (page 459), this court would no doubt hold that even if the State of New York actually owned and operated the lines of the Coney Island and Brooklyn Railroad Company, the business so conducted by the State of New York would be subject to an excise tax imposed by Congress, and yet appellant claims that a mere private corporation operating the lines for its own profit cannot be taxed, because it holds a franchise from the State of New York!

If, as is claimed, Congress cannot tax corporations chartered by the States, and if this is one of the subjects of taxation over which Congress has no power, such as *exports*, then it must follow *(Fairbank vs. United States, 181 U. S., 283)*, that the result cannot be accomplished in any manner, directly or indirectly, and whether or not individuals as well as corporations are included in the tax. That this is not the case is shown by the following, among other cases :

Spreckels Sugar Refining Co. vs. McClain (192 U. S., 397), (Tax on corporations and individuals engaged in the business of refining sugar).

Thomas vs. United States (192 U. S., 363), (Tax on sales of shares of corporate stock).

Railroad Company vs. Collector (100 U. S., 595), (Tax on earnings, dividends, interest, payments, etc., of railroad companies upheld, although individuals, of course, were not taxed).

Pacific Insurance Co. vs. Soule (7 Wall., 433), (Insurance Companies included in general income tax).

A further refutation of the claim that, because the States have the power to create, regulate and control corporations, therefore such corporations are not proper subjects of taxation by Congress is found in the

License Tax Cases (5 Wall., 462, 475),

in which it was argued that since the State had the sole right to tax, control or regulate *intra-state business*, Congress had no power to impose excise taxes upon such business. It was held, however, at page 476:

> "5. That the recognition by the Acts of Congress of the power and right of the States to tax, control or regulate any business carried on within its limits, is entirely consistent with an intention on the part of Congress to tax such business for National purposes."

A similar argument was made in the case of

McCray vs. United States (195 U. S., 27),

namely that the oleomargarine tax was an illegal interference with the internal commerce of the States. This court upheld the validity of the tax.

The cases upholding the validity of the Federal inheritance taxes, too, cannot be distinguished in principle from the present case, so far as sovereign rights of the State are concerned. In fact this Court says in the case of

Plummer vs. Coler (178 U. S., 115, 137):

> "Without undertaking to go beyond what has already been decided by this court in *Mager v. Grima*, 8 How., 490, in *Scholey v. Rew*, 23 Wall., 331, and in *United States v. Perkins*, 163 U. S., 625, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State, and *we*

are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and receive property under the statutes regulating the descent of the property of decedents. And, at all events, the mischief apprehended, of impairing the borrowing power of the government by State taxation is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance." (Italics ours.)

It was held in these Inheritance Tax Cases that *for the very reason* that the States have absolute power and control over rights of inheritance and succession and in spite of the fact that such rights do not emanate from the Federal government, still they are proper subjects of taxation by Congress.

Scholey vs. Rew (23 Wall., 331).
Knowlton vs. Moore (178 U. S., 41).
Plummer vs. Coler (178 U. S., 115).
Snyder vs. Bettman (190 U. S., 249).

But it is claimed that there are cases in this Court which uphold the converse of this proposition and therefore this proposition is true "*unless*", as counsel for appellant well add (p. 28), "Congress can tax the franchise of a State railroad company but a State cannot tax the similar franchise of a railroad company chartered by Congress." This, we submit, is exactly the fact; Congress can tax the franchises of State corporations together with all other rights, privileges and other property within the jurisdiction and under the control of the several States (except exports) with the sole limitation, mentioned above, that Congress cannot tax certain property and instrumentalities considered necessary for the existence and proper governmental functions of the State. With the exception of this sole limitation, which is well defined in the *South Carolina case (supra)*, the taxing power of

Congress is indeed searching and unlimited, reaching every subject within the territorial limits of the Union.

On the other hand what are the powers of taxation of the several States? Of course, they have the same limitation as to taxing the property and instrumentalities of the Federal government necessary for its existence and proper governmental functions, but further they have this very important limitation, namely, that as to subjects delegated by the Federal Constitution to Congress, the States may not interfere by regulation, taxation or other means. This limitation which, of course, has no application to the taxing power of the Federal government, covers a great number of subjects such as interstate and foreign commerce, the Federal postal system, patents and copyrights and other subjects delegated to Congress. It does not matter whether these subjects are made ordinary governmental functions of the Federal government by the delegation of such powers to Congress, or whether the limitation upon the taxing power of the States with regard to these subjects is a further one implied from the express provisions of the Constitution. In either case, the result is the same and clearly illustrates why cases concerning these matters delegated to Congress do not decide the converse of the question raised by counsel for appellant.

In fact no such "converse" cases *can* arise for it was established, as long ago as the case of

McCulloch vs. Maryland (4 Wheaton, 316),

that Congress has power to grant corporate franchises *only* with regard to and in furtherance of the express powers delegated to Congress by the Constitution.

In every case in which it has been held, directly or indirectly, that a State may not tax a corporate franchise granted by Congress, it will be found that the real reason for this is not that the mere franchise as such is is part and parcel of the sovereign governmental instrumentalties of the federal government, but that

the functions, duties and operations of such corporations fall within the protection of the powers delegated to Congress, and therefore, are not subject to interference by the States.

In the very case of

McCulloch vs. Maryland (4 Wheat., 316),

Chief Justice MARSHALL pointed out this fact and showed the distinction between taxation by Congress and taxation by the States in the following language :

> " It has also been insisted that, as the power of taxation in the General and State Governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the States will equally sustain the right of the States to tax banks chartered by the General Government. But the two cases are not on the same reason. The people of all the States have created a General Government and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents ; and these taxes must be uniform. But when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves for the benefit of others in common with themselves. The difference is that which always exists, and must always exist, between the action of the whole on a part and the action of a part on the whole—between the laws of a government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme."

And, further, in the case of

Osborn vs. Bank (9 Wheat., 738),

the same great Judge in discussing and affirming the case of *McCulloch vs. Maryland*, shows still more clearly that it was not the mere fact that the Bank in

that case held a franchise from Congress which placed it beyond State powers of taxation, but the fact that its operations were in furtherance of one of the powers delegated to Congress. The language employed at page 862 is unmistakable:

> "We do not maintain that the corporate character of the bank exempts its operations from the action of the state authorities. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the Nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially."

Also in the case of

California vs. Central Pacific R. R. Co. (127 U. S., 1),

so much relied upon by the appellant in this case, the franchise granted by Congress to the Central Pacific Railroad Company was granted for the purpose of carrying out the powers delegated to the Federal Government of regulating interstate commerce, providing for the transportation of the mails, etc. This appears from the opinion (page 39):

> "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to

construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. * * *

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens."

The distinction is further emphasized in the case of *Reagan vs. Mercantile Trust Co.* (154 U. S., 413),

which holds that a railroad corporation chartered by Congress is as to all matters relating to *intra state* business as distinguished from interstate commerce, subject to the full control of the State of Texas in the matter of taxation and regulation of rates.

The patent and copyright cases also cited by appellant's counsel fall within the same category: Since the right to provide for and regulate these matters was entrusted by the States to the Federal Government, the States, of course, cannot burden or interfere with patents or copyrights as such.

So far we have assumed that the tax is in reality a tax upon corporate franchises, because we believe that this court may well lay at rest, once and for all, the contention that a federal tax upon the franchises of State-chartered corporations is an unconstitutional interference with the sovereignty of the States. Such a contention, if sustained, might lead to disastrous results to the financial credit of the United States in view of the already great and fast increasing proportion of the business and property throughout the country held and controlled by corporations.

POINT II.

The tax in question, even in some respects an income tax, is not a direct tax within the meaning of the Constitution.

We do not object to appellant's strenuous argument that the tax in question is in reality a franchise tax because as such it unquestionably would be valid, and further, because all arguments which show that it is a franchise tax also show that it is *not an income tax.* But, if counsel for appellant, abandon their first argument, as they seem to do in their learned brief (Point III), and seek to prove that this is an income tax, in spite of the fact that it expressly purports to be an excise tax upon business, they must go further and show that it is an income tax similar in nature and result to the tax held unconstitutional in the *Income Tax Cases*, for, of course, it was only that sort of an income tax which was held to be a direct tax.

Admitting that the present tax is an income tax, it is submitted that it is not a direct tax, either within the meaning of the constitutional provisions or within the decision of this court in the *Income Tax Cases.*

For even if a *general income tax*, covering the incomes of individuals, be held to be a direct tax, yet a tax upon the incomes of corporations and joint stock companies is essentially and fundamentally to be distinquished.

The right of a corporation to own and hold real and personal property, and therefore, of course, to receive the income thereof is, just as the corporation's very existence, a creature of the law entirely unlike the natural right of persons in general to own and hold property and receive its income. The Mortmain Statutes and the laws of many of the States, especially the earlier laws, expressly prohibiting or materially limiting the right of corporations to hold real estate

and to some extent personal property, are instances showing the artificiality of corporations' rights in this regard.

Such rights are certainly no less the favor and creature of the law than the right of inheriting property, and yet this court has held that a Federal inheritance tax need not be apportioned because it is not a direct tax on the property inherited, even if measured by the value of such property. How can it be held that a tax upon the right of a corporation to receive the income of property, even if measured by the amount of such income, is invalid because a direct tax upon the property which furnishes the income?

A joint stock company comes within the same rule as a corporation in this respect; although to some extent it is recognized at common law (inheritances, too, of course, are recognized at common law), it is subject to complete statutory regulation, which, as this court will judicially notice, has actually taken place in a large number of the States and in England (The "*Bubble Act*" and the later "*Companies Act*"). Certainly a joint stock company cannot be said to have an inalienable right to hold property when the States can pass laws at any time actually forbidding the creation of such companies or prohibiting them from holding property.

The following language from the case of

Knowlton vs. Moore (178 U. S., 41, 59),

is pertinent in dealing with the artificial rights of corporations:

> "In legal effect, then, the proposition upon which the arguments rests is that wherever a right is subject to exclusive regulation by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National

government from almost every subject of direct and many acknowledged objects of indirect taxation."

We repeat also the following extract from the opinion in *Plummer vs. Coler* (178 U. S., 115, 137):

"Without undertaking to go beyond what has already been decided by this court in *Mager v. Grima*, 8 How., 490; in *Scholey v. Rew*, 23 Wall., 331, and in *United States v. Perkins*, 163 U. S., 625, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State, and we are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations composed of individual persons and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents. And at all events, the mischief apprehended of impairing the borrowing power of the government by state taxation is the same whether that taxation be imposed upon corporate franchises or upon the privilege created and regulated by the statutes of inheritance."

The distinction between *natural rights* and those which are subject to the control and regulation of State laws and which may be called *privileges*, is well shown by the case of

Nicol vs. Ames (173 U. S., 509, 521),

in which a Federal tax upon sales of property made at exchanges was in question. This court says, at page 521:

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there

> offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by Government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed."

The foregoing proposition, *i. e.*, that a Federal tax upon the income of corporations is not a direct tax because it is rather an excise upon the artificial rights of corporations who hold property and receive income therefrom, than a direct tax upon the property, we believe to be of importance, since the Act now in question covers income from *all sources*, whether or not actually derived from business, and further appears to cover *all corporations* and joint stock companies, whether or not engaged in *active business* within the construction of some of the State statutes. Even all such income and even corporations not engaged in "active business" may, we submit, be taxed by Congress without apportionment for the foregoing reasons.

Nothing adverse to the contention that *all income*, whether or not actually derived from business, may be taxed under the present act is found in the case of

Spreckels Sugar Refining Co. vs. McClain
(192 U. S., 379),

for in that case the tax was imposed upon individuals as well as corporations, and further, the statute then in question was so worded as to include only income derived from business. This court dealt only with the construction of the statute, the language of which was as follows:

> "Every person, firm, corporation or company carrying on or doing the busines * * * of refining sugar * * * shall be subject to pay

annually a special excise tax equivalent to one-fourth of one per centum on the gross amount of all receipts of such persons, firms, corporations and companies *in their respective business.*"

U. S. Stat., 1898, Chap. 448, § 27, 30 Stat. L., 464.

Even apart from the consideration that corporations and their rights to own and hold property are mere creatures of law and are therefore taxable as for a *privilege*, it is submitted that the tax in question properly covers entire income from all sources (except perhaps state and municipal stock and bonds, not involved in this suit) for the reason that it is an excise tax upon business, and that a permissible, although perhaps not a perfect measure of a tax upon corporate business, is the entire net income of the corporation.

Counsel for appellant claim that the tax in question is not a tax on business or occupation.

1st. Because individuals engaged in like businesses are not taxed ;

2nd. Because the tax is measured by a percentage of income from *all sources ;*

3rd. No specific kinds of business are specified but all kinds are taxed ;

4th. The tax covers the business of exporting.

Appellant's first objection is easily disposed of. The tax is a tax upon the *doing of business by corporations and joint stock companies.* Their right of doing business, apart from their right to exist and hold property, considered above, is distinct from the natural right of individuals in general to engage in business, just as the right to buy and sell property at an exchange is distinct from the general natural right to buy and sell property anywhere. A tax on the former is an excise tax on a privilege, while a tax on the latter may be held to be a direct tax on property.

Nicol vs. Ames (173 U. S., 509).

Corporations doing business have advantages *in doing business* over individuals. Practically their sole

object is, of course, the doing of business, and if they had not actual, practical advantages in this, would the expense of creating and maintaining corporate existence be undertaken in such a vast number of cases?

These actual, practical advantages were exactly what this court held taxable by an unapportioned excise tax in the case of *Nicol vs. Ames*, just cited.

Furthermore, the Federal government in the past has imposed taxes falling only upon corporation engaged in certain businesses, without the sightest suggestion or objection that the taxes were improper because not excise taxes on business.

Veazie Bank vs. Fenno (8 Wall., 533).
Railroad Co. vs. Collector (100 U. S., 395).
United States vs. Railroad Co. (17 Wall., 322).

Appellant's second objection, *i. e.*, that the tax in question is not a tax on business because income from *all sources* is taxed, is sufficiently answered by a number of decisions in this court. In many of these cases this court had under consideration State taxation which, of course, has far greater limitations than Federal taxation, not only because of the Fourteenth Amendment of the Federal Constitution, but also the Constitutions of many of the States themselves, some of which have comprehensive provisions covering the subject of taxation.

In all these cases the method of *measuring taxation*, especially with regard to corporations, because of the intricacy and delicacy of the subject and the inherent impossibility of reaching any perfect method of determining the proper measure, has been treated with great liberality by this court and only schemes which are substantially and manifestly unfair and illegal have been rejected.

Measuring excise or privilege taxes by *gross receipts* or net income from all sources, whether or not directly derived from the privilege in question, is an extremely common method and has frequently been upheld by this Court.

For instance, a State which, of course, has no power to tax receipts of a carrier derived from interstate commerce, is allowed to measure the receipts from *intra state* business which it may tax, by a proportion of the gross receipts of the carrier from all sources equal to the proportion of the mileage of operation within the State and the total mileage of the carrier.

Maine vs. Grand Trunk Rwy. (142 U. S., 217).

This measure of the amount of *intra state* business manifestly encroaches upon the revenues of interstate commerce even after the proportion is taken, for, if the carrier operates in say three or four States and they each tax a third or fourth of the total gross receipts, the entire gross receipts will finally be taxed and in this way the carrier will ultimately be taxed as if its entire business were conducted within the limits of each of the several States and as if *none* of its business crossed the lines of any one State!

Yet this measure of taxation is the usual one, and properly we submit, for the inconvenience and impracticability of determining the actual facts in such cases make an exact rule impossible.

Measures of taxation which approximate proper results have been upheld by this Court in the following cases:

Provident Institution vs. Mass (6 Wall., 611).
Hamilton Co. vs. Mass. (6 Wall., 632).
Pacific Ins. Co. vs. Soule (7 Wall., 433).
State Railroad Tax Cases (92 U. S., 575).
Western Union Tel. Co. vs. Mass. (125 U. S., 530).
Bell's Gap Rd. Co. vs. Pennsylvania (134 U. S., 232).
Pullman Co. vs. Pennsylvania (141 U. S., 18).
Postal Tel. Cable Co. vs. Adams (155 U. S., 688).

In the case of *Home Insurance Company vs. New York* (134 U. S., 594) a law of the State of New York

imposing a tax which purported to be a tax upon corporate franchises measured by the amount of dividends paid during the preceding year, was claimed to be in reality an income tax and to be invalid in so far as it included income from United States Bonds. It was held, however, that the tax although measured by dividends *derived from income* was what it purported to be, namely, a tax on the corporate franchises of the company and valid in its entirety.

The case of

McHenry vs. Alford (168 U. S., 651).

is also closely analogous. The act creating the territory of Dakota provided

> "nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

The Northern Pacific Railroad owned large tracts of land within the limits of the territory of Dakota, granted to the railroad company by Congress and covered by general mortgages upon all the company's property. The territorial legislature imposed a tax upon this property, in lieu of all other taxes, measured by a certain percentage of the gross earnings of the road. With regard to the tax as imposed on these tracts of land, which appear to have been entirely vacant, this Court held that the lands could be taxed in a manner different from other lands because, by being included in the railroad mortgages, they had made possible the raising of money to build and operate the road, and further, because their *possible use* in connection with the road gave them a position different from that of other lands.

In the present case, it is submitted that the reasons for taxing income from all sources are much stronger than the reasons given in the case of *McHenry vs. Alford*, just cited.

All corporations which hold a substantial surplus use it in connection with their business in one way or

another, as security for mortgages and loans, for obtaining financial standing and credit by advertising the fact, and in other ways.

Corporations *must* have some business reasons for building up and maintaining such funds, and it is well known law, of course, that if they have no such reasons the stockholders can compel a distribution of the funds in dividends.

Finally the amount of income derived by corporations in general from property not used directly or indirectly in their business, is comparatively so insignificant, so difficult to determine, and would be the cause of so much litigation and uncertainty that we believe the measure of taxation selected in the present instance is by far the most convenient, satisfactory and fair that could have been determined upon.

Appellant's third objection to the tax, *i. e.*, that because all businesses are taxed therefore it is not a tax upon business, needs only to be stated to be rejected.

If any business or occupation may be taxed by the Federal government, is it necessary to ask whether all businesses or occupations may likewise be taxed ?

The instances of taxes upon business and occupations, imposed not only by the Federal Government but by the States themselves, are too numerous and too well known to require mention or citation, and appellant's argument that because in the past they have been imposed only upon certain specified businesses, therefore they may not be imposed in general, lacks force when it appears that the right to impose such taxes is not limited to any one class of business. If each may be taxed separately, all may be taxed together.

Appellant's fourth objection that the tax is invalid because it covers the business of exporting, is of course not sufficient to affect the general constitutionality of the Act. The objection has no application to the present case.

Counsel for appellant further object that with re-

gard to the circumstances in this case, the tax is really an income tax because defendant, Coney Island and Brooklyn Railroad Company, derives substantially its entire income from the use of real and personal property and the exercise of franchises which by the laws of the State of New York are defined to be real estate.

The unsoundness of this objection is apparent. How many businesses are there of any sort which do not derive substantially their entire income from real and personal property in one form or another? Have not counsel for appellant forgotten that they must show that the tax in question *is a direct tax, not indirectly a direct tax, nor indirectly an income tax, but a direct tax upon real or personal property?*

POINT III.

The tax imposed by the Act is "uniform" and does not deprive any corporation or association of its property without due process of law.

The only provision of the Federal Constitution (aside from the exception of exports) which limits the absolute right of Congress "to lay and collect taxes, duties, imposts and excises" for the purposes mentioned in Article I., Section 8, of the Federal Constitution, is contained in the same article and section in the following language:

> "But all duties, imposts and excises shall be uniform throughout the United States."
>
> *License Tax Cases* (5 Wall., 462, 471).
>
> *McCray vs. United States* (195 U. S., 27, 50).

Appellant does not seriously contend that the tax is not "uniform throughout the United States." That

these words imply only geographical uniformity is so well settled by recent decisions of this court that it is necessary only to cite the following

Head Money Cases (112 U. S., 580).
Knowlton vs. Moore (178 U. S., 41).
Patton vs. Brady (184 U. S., 608).

The tax in question, of course, is geographically uniform within the decisions in these cases, since it applies with the same force and effect to corporations and joint stock companies in every State in the Union.

Counsel for appellant with great industry have collected and cited many cases and authorities supposed to deal with the subject of taxation in connection with the Fifth Amendment, which forbids the taking of property without due process of law. It will be found upon examination, however, that nearly all these cases deal only with taxation by the States under the far more comprehensive restrictions of the Fourteenth Amendment and their own Constitutions. It is the "*equal protection of the laws*" clause in the Fourteenth Amendment, which, of course, does not apply to the Federal Government, that has given rise to the numberless cases of "classification" for purposes of State taxation considered by this Court as well as the State Courts.

We might easily show that the present Act could be sustained under the more stringent provisions of the Fourteenth Amendment, or even under the Constitutions of practically all of the States, for the classification of the present Act, and its exemptions are similar to those contained in the provisions of nearly all the State tax laws (*Beers vs. Glynn, 211 U. S., 477, 484–5*); but that consideration is entirely beside the point, since the only provision relating to the Federal Government is that of the Fifth Amendment that "no person shall be deprived of property without due process of law."

To argue that the tax is invalid because it takes

property without due process of law, and then, when pointing out the want of due process, to claim that it results from the fact that the tax is invalid, is manifestly but to argue in a circle and to beg the question as well. If the tax is valid, there is, of course, no want of due process of law. If the tax is invalid, it must be for some defect in the tax *as a tax*. In this case the only possible defect would arise from the want of geographical uniformity, which is not claimed.

This whole subject received such careful and thorough consideration in the recent case of *McCray vs. United States* (195 U. S., 27, 50), that it would be superfluous to cite authorities here. We refer to the admirably clear and convincing opinion in that case, which is of too great length to be quoted adequately.

The remaining contentions of appellant's counsel that *equality* as well as uniformity are required of a Federal tax, irrespective of constitutional limitations, are unsustained by any authorities in this Court, except perhaps the *dicta* of Mr. Justice FIELD in the *Income Tax Cases*, which *dicta* were not concurred in by any other member of this Court, and which, it is respectfully submitted, are squarely opposed to the decisions in the cases of

McCray vs. United States (supra).
Patton vs. Brady (184 U. S., 608).

In the latter case this Court's conclusion was concisely stated as follows by Mr. Justice BREWER at page 623 :

> " Geographical uniformity being therefore that only which is prescribed by the Constitution, the Courts may not add new conditions, and the statute in question fully complies with that requirement. It is not the province of the judiciary to inquire whether the excise is reasonable in amount or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final."

The claim that excises must be *equal* and uniform, and be " laid according to some rule of apportionment"

as asserted in the case cited in appellant's brief (page 55), when applied to taxes imposed by the Federal Government, would set at naught the distinction of the Constitution between direct taxes and excises and further would make the provision that excises shall be "uniform throughout the United States" entirely meaningless.

POINT IV.

A tax upon the franchises or business of State railroads or public service corporations is not an interference with governmental functions or instrumentalities of the States, and is valid.

If there ever had been any doubt upon this subject we submit that it was finally settled by the decision and reasoning in the case of

South Carolina vs. United States (199 U. S., 437).

In that case it was held that if a state chose to enter into the business of selling liquors, whether nominally under the police power of the State or as a business enterprise, its agents and property employed in this business were subject to Federal taxation.

The very instance of public utilities, including railroads, if they should be taken over and operated by the States themselves, was used as an argument in sustaining the tax. The extract from page 454 of the opinion is so pertinent that we repeat it:

> "More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely

therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government?

We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National government."

The court then proceeded to examine numerous decisions of State Courts clearly showing the distinction between properly governmental functions of States and their *quasi private* functions, and concluded at page 463 as follows:

"Now, if it be well established, as these authorities say, that there is a clear distinction as

respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation?"

In addition to the cases cited by this Court in the *South Carolina case (supra)* is the recent important case in the New York Court of Appeals, involving a public utility in the form of a subway owned and constructed by the City of New York.

Matter of Rapid Transit Commissioners (197 N. Y., 811). The language used at page 96 is so clear and concise that we repeat it:

"1. Was the action of the city in building the subway governmental or proprietary in character?

"The city owns the subway and it is a railroad corporation so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted to build and operate the road. It is authorized to lease its railroad, either for 'a specified sum of money or a specified proportion of income, earnings or profits'; or it may operate the road, itself, and charge such rates of fare for the transportation of persons and property as may be fixed by its own boards and officers (§§ 27 and 30). In other words, the subway is a business enterprise of the City, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a proprietor, not as a sovereign (Maxmillian v. The Mayor, 62 N. Y. 160; Messano v. The Mayor, 160 N. Y. 123; South Carolina v. The United States, 199 U. S. 437)."

It may be added also that a Federal tax upon State-chartered railroad corporations was in question and sustained in the case of

Railroad Company vs. Collector (100 U. S., 595).

The reasons why the case of

California vs. Pacific R. R. Co. (127 U. S., 1)

has no application to the case of a tax imposed by the Federal government were considered so fully above (Point 1, pages 11–15) that we shall not repeat them here.

The same reasons distinguish the case of a Federal tax upon a so-called public service corporation chartered by a State. The only reason that a railroad chartered by Congress is exempt from State taxation, so far as its franchise—its right to operate—is concerned, is that it fulfills duties and exercises powers expressly granted to Congress by the Constitution. These powers cause exemptions from State taxation in addition to the exemption of what would otherwise be the strictly governmental functions of the United States as a sovereign.

There is no such additional exemption, on the other hand, which limits Federal taxation. If the subject taxed does not fall within the one exemption, *i. e.*, of State agencies and instrumentalities "*of a strictly governmental character*" the tax is valid. That a public service corporation does not properly fall within this strictly governmental exemption, and the disastrous results to the National revenues and credit which might ensue if they were exempted, clearly appear from the *South Carolina* and other cases cited above.

POINT V

Even if the tax should be held unconstitutional in some respects, the main purpose of the Act, being clearly within the powers of Congress, should be upheld.

Assuming, what of course is not in issue in this case, that the tax is invalid in so far as it covers income derived from State or municipal bonds and further, in so far as it covers the business or occupation of exporting, and, finally, in so far as it taxes the amount of income derived from real estate or invested personal property not actually employed in business, yet, it is submitted, these objections are not of sufficient importance with relation to the purpose and scope of the entire Act to warrant a decision that the provisions of the Act are not separable or that Congress would not have enacted the law if it had known of the unconstitutionality of these minor points.

In this, the case is entirely dissimilar from the *Income Tax Cases*, in which it was held that income derived from real estate and invested personal property and State or municipal bonds was so vitally *of the essence of the Act* that the tax could not be sustained as an excise tax on income derived solely from business or occupation, and therefore, the whole must fall.

In the present case, the Act is imposed only upon every corporation, joint stock company and association "*with respect to the carrying on or doing business by such corporation, joint stock company or association.*" Congress clearly had in mind, therefore, an excise tax upon the business done by corporations and associations and even if this court should hold that the

method of measuring the tax by net income from *all sources* is unconstitutional, yet it is submitted that income derived solely from actual business may properly be taxed under the present Act. Only in exceptional cases would the result thus obtained be substantially different from that intended by the exact terms of the Act.

WILLIAM N. DYKMAN,
ARTHUR E. GODDARD,
Of Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. ~~152~~. 410

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MAR 14 1910
JAMES H. McKENNEY,
Clerk

FRANCIS L. HINE, APPELLANT,

vs.

HOME LIFE INSURANCE COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEES

IN SUPPORT OF THE CONTENTION THAT THE FEDERAL CORPORATION TAX LAW OF 1909, PROPERLY CONSTRUED, IS CONSTITUTIONAL.

WASHINGTON, MARCH 14, 1910.

WILLIAM D. GUTHRIE,
VICTOR MORAWETZ,
HOWARD VAN SINDEREN,
Of counsel for Appellees.

Supreme Court of the United States,

OCTOBER TERM, 1909. No. 752.

FRANCIS L. HINE, Appellant,

versus

HOME LIFE INSURANCE COMPANY, THOMAS H. MESSENGER, J. WARREN GREENE, H. E. PIERREPONT, THOMAS T. BARR, GEORGE E. IDE, WILLIAM A. NASH, JOHN F. PRAEGER, ELLIS W. GLADWIN, JOHN E. BORNE, WILLIAM M. ST. JOHN, JOHN S. FROTHINGHAM, MARTIN JOOST, E. LE GRANDE BEERS, COURTLAND P. DIXON, ANTON A. RAVEN, ROBERT B. WOODWARD, WILLIAM A. MARSHALL and WILLIAM G. LOW, JR., directors of said company.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEES.

This is an appeal from a final decree of the Circuit Court of the United States for the Southern District of New York, sustaining a demurrer interposed on behalf of the defendant Home Life Insurance Company and its directors and dismissing the bill. The controversy arises under section 38 of the act of Congress entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes,"

approved August 5, 1909, c. 6, 36 Stat. 112. The suit is brought by the complainant, Francis L. Hine, as a stockholder and policy-holder, to enjoin the defendant company and its directors, from complying with the law. The facts are not in dispute, and are correctly stated in the bill of complaint and in complainant's brief at pages 4–8. The defendant and its directors were advised and took the position that the act of Congress, properly construed, was a valid exercise of the taxing power vested in Congress and was not unconstitutional as claimed by the complainant. The following brief is submitted in support of this position.

The Home Life Insurance Company is a life insurance company incorporated under the laws of the State of New York. It has a capital stock of $125,000, and assets of approximately $22,000,000. The company owns in fee real estate of the value of $1,643,609; United States Government bonds to the amount of $11,193; bonds of the State of New York to the amount of $109,500; municipal corporate stock of the City of New York to the amount of $102,160; bonds of other municipal corporations within the United States to the amount of $53,800; bonds and stocks of solvent corporations incorporated under the laws of the United States or of one or more states, to the amount of upwards of $10,000,000; and real estate bonds and mortgages to the amount of $6,105,030 (record, fol. 3). The net income of the company for the year ending December 31, 1909, amounted to about $450,000, and a large part of this income was derived from the securities hereinbefore mentioned (fol. 4).

The points submitted on behalf of the appellees are substantially as follows:

1. That the tax imposed by the act of August 5, 1909, is an excise and within the constitutional power of Congress.

2. That the act, properly construed, does not include a tax upon income derived from United States bonds, state, county or municipal securities, or income directly derived from real and personal property.

3. That if the act should be construed as taxing income derived from non-taxable securities, or from real and personal property, it would be unconstitutional, but that the invalid part of the tax would be severable, and that the tax would be valid and enforceable in so far as it imposes an excise tax upon income derived from the carrying on or doing business by corporations, joint stock companies and associations organized for profit and insurance companies.*

I.

As to the power of Congress to lay excise taxes.

The tax now under consideration is described in the act of Congress as "a special excise tax with respect to the carrying on or doing business." This declaration on the part of Congress as to the nature of the tax is, of course, entitled to great weight; and unless it was plainly erroneous, or merely a subterfuge, the declared purpose

* The text of the act of August 5, 1909, and of the Internal Revenue Regulations, together with a general discussion of its provisions, will be found in Machen on the Federal Corporation Tax Law recently published (Boston, Little, Brown & Company). The constitutionality of the law is also interestingly discussed by Professor Goodnow in the Columbia Law Review for December, 1909, by Mr. Hugh A. Bayne in the Outlook for January 1, 1910, and by Mr. John S. Sheppard, Jr., in the Harvard Law Review for March, 1910.

of Congress to impose an excise tax must be given effect. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 411.

The power to lay and collect excises is granted in express terms by the Constitution, and the only express limitation is that "excises shall be uniform throughout the United States." At this day, it is no longer open to question that a tax upon carrying on or doing business, or upon the net income derived from carrying on a business is an excise, and that Congress may impose such a tax. *Pacific Insurance Company* v. *Soule*, 7 Wall. 433, 443; *Railroad Co.* v. *Collector*, 100 U. S. 595, 598; *Springer* v. *United States*, 102 U. S. 586, 598; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 411; *South Carolina* v. *United States*, 199 U. S. 437, 454. Furthermore, after the decision in the *Income Tax Cases*, it was decided by this court that the constitutional limitation that excises shall be uniform throughout the United States prescribes merely geographical uniformity. *Knowlton* v. *Moore*, 178 U. S. 41, 83.

The nature of the tax is not affected by the fact that it is imposed only upon corporations, joint stock companies and associations organized for profit, and having a capital stock represented by shares, and upon insurance companies. If a tax applicable to individuals would be an excise within the meaning of the Constitution, a similar tax applicable to corporations and other joint stock companies, or to insurance companies, would be an excise; and, likewise, if a tax applicable to individuals would be a direct tax within the meaning of the Constitution, a similar tax applicable to corporations, joint stock associations, or to companies of any class, would be a direct tax.

The Constitutional provisions conferring upon Congress power to impose taxes make no distinction between corporations and individuals. Corporations are not mentioned in the Constitution. The power to tax private corporations organized under state laws is co-extensive with the power to tax individuals. Congress cannot impose upon corporations, or upon companies or associations of any class, an excise tax that could not be imposed constitutionally upon individuals, and it cannot impose upon individuals an excise tax that could not be imposed upon corporations and other companies and associations; but Congress can impose a valid excise tax upon corporations, or upon companies or associations of any class, without including individuals, and it can impose such a tax upon individuals without including corporations, or other companies, or associations.

The appellants contend that the tax imposed by section 38 of the act of August 5th, 1909, is essentially a franchise tax and that Congress cannot impose a franchise tax upon state corporations as these are instrumentalities of the state governments. This argument appears to be the result of a confusion of ideas. The franchise to be a corporation, or to carry on business in a corporate capacity, certainly does not of itself render a corporation a governmental instrumentality or agency. The great majority of corporations, like ordinary partnerships, have been formed under general laws for purely private purposes. The argument that a state, by authorizing individuals to form a corporation, can exempt them from the power of Congress to impose an excise tax upon their private business does not require serious con-

sideration. There are special franchises which may be conferred by a state upon corporations or individuals to enable them to perform certain functions which could be performed by the state itself, as, for example, the franchise to condemn lands or to use the public streets and highways for the construction, maintenance and operation of railroads, gas works, water works, etc. Undoubtedly, railroads, gas works, water works and other public utilities, when owned and operated by the state itself, cannot be taxed by the United States Government, but it is well established that such public utilities, when owned and operated by private corporations, or by individuals for purposes of profit, are proper subjects of taxation. *Union Pacific R.R. Co.* v. *Peniston*, 18 Wall. 5, 31. If owned by the state, but operated by it as a business for profit, they would then come within the principle of the *South Carolina* case, *supra*.

It is true that an agreement of partnership can be entered into at common law without statutory authority, whilst corporate capacity, with its separate entity, succession and freedom from personal liability, cannot be so assumed under our system, and, therefore, may be said to be a right or privilege granted by statute. But at the present day the laws of the several states authorize the formation of corporations for any lawful business purpose, by executing and filing a certificate or articles of incorporation. If a state were to enact a law permitting partnerships to be formed only in a prescribed manner and upon paying a license fee, no one would seriously urge that this right constituted a special fran-

chise or privilege, which would exempt partnerships from federal taxation In the case of the Coney Island and Brooklyn Railroad Company, No. 751, submitted with the case at bar, the defendant railroad company operates a railroad under a special franchise from the State of New York; but it is well settled in that state that such a franchise is entirely distinct and different from the so-called franchise to be a corporation. *City of New York* v. *Bryan*, 196 N. Y. 158, 163; *People* v. *O'Brien*, 111 N. Y. 1, 47. A federal tax on the franchise to condemn property and to operate a railroad in the State of New York might come within the ruling of the court in the case of *California* v. *Central Pacific Railroad Co.*, 127 U. S. 1. This case, however, did not overrule or qualify *Railroad Co.* v. *Peniston*, *supra*. On the other hand, a tax upon the mere exercise of corporate capacity, levied impartially and uniformly upon all corporations, would be essentially different.

The fact that the tax in question applies to all unincorporated joint stock companies and associations organized for profit, and having a capital stock represented by shares, indicates clearly that Congress did not regard the tax as a franchise tax. As is well known, there are many large joint stock associations in the United States that are not incorporated and that have uniformly escaped franchise taxes on that very ground. The large express companies are not incorporated. They are, of course, organized under the laws of a state, *e. g.*, New York, just as a partnership is organized under the laws of a state. Although such organizations possess some of the attributes of corporations and hence are properly classified with them for purposes

of taxation, as shown in *People ex rel. Platt* v. *Wemple*, 117 N. Y. 136, they are not vested with any franchise to be a corporation.

As Chief Justice Chase said in the *License Tax Cases*, 5 Wall. 462, 471: "The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject." But a tax upon income derived from an occupation or business is not a grant of a license to engage in business, nor is it a regulation of business. When Congress, under the lead of Hamilton, imposed the first excise on the use of distilled spirits, it did not grant a license, or privilege, or franchise to manufacture or sell distilled spirits. Congress had no power to authorize the manufacture of liquor in the several states. A provision in an act of Congress prohibiting the distilling of spirits without paying a prescribed tax and imposing a penalty for violating the prohibition would be merely a means "necessary and proper for carrying into execution" the taxing power, as authorized by section 8 of Article I of the Constitution. When Congress taxes the manufacture or sale of tobacco, it does not do so under any power to regulate the manufacture or sale of tobacco, but solely under the power to levy an excise tax. *Patton* v. *Brady*, 184 U. S. 608. When Congress, during the War of the Rebellion, taxed any person, firm, or company publishing any newspaper, magazine, review, or other literary, scientific, or news publication (act of June 30, 1864, c. 173, sec. 114, 13 Stat. 280), it did not thereby attempt to interfere with the liberty of the press, or to regulate the publication of news, for it had no constitutional power to do so. When Congress has laid check

stamp taxes, it has not proceeded upon the theory that it had power to regulate, or to prohibit, or to authorize the drawing of checks on state banks. So also as to the federal stamp tax on sales of stock involved in *Treat* v. *White*, 181 U. S. 264; *Thomas* v. *United States*, 192 U. S. 363. When Congress taxed successions, it did not do so in the exercise of a power to regulate inheritances, but wholly in the exercise of its power to lay an excise tax upon transfers of the property of decedents. See *Knowlton* v. *Moore*, 178 U. S. 41, 59. When Congress taxed sales at exchanges, no one pretended that it had power to regulate dealings at exchanges, but it was recognized that transfers of personal property at exchanges were proper subjects of an excise tax. *Nicol* v. *Ames*, 173 U. S. 509, 519. Similarly when Congress imposes upon "every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company," doing business in the United States, a tax equivalent to one per cent. of the net income derived from their respective businesses, this is merely an exercise of the power to impose an excise tax upon the income derived from the transaction of business.

It is further contended on behalf of the appellant that an excise tax imposed generally upon *all* businesses and occupations would be unconstitutional, but that a tax upon selected or enumerated businesses or occupations would not be unconstitutional. Stated in other language, the contention is that Congress may constitutionally lay an excise tax upon any number, however large, of different businesses and occupations, provided that the several busi-

nesses or occupations be described separately, but that Congress cannot impose a tax in general terms upon all businesses and occupations, because such a tax would be a direct tax. The mere statement of this proposition, if we correctly comprehend it, should be sufficient to refute it. The isolated expressions selected by counsel from decisions of this court do not support this proposition. There are numerous instances in which Congress has imposed excise taxes upon all businesses, trades and professions without enumerating them separately. Thus, in the act of August 5, 1861, c. 45, sec. 49, 12 Stat. 309, the tax was levied upon income derived "from any profession, trade, employment or vocation carried on in the United States or elsewhere"; the same language was used in the act of June 30, 1864, c. 173, sec. 116, 13 Stat. 281; so also in the act of March 3, 1865, c. 78, sec. 1, 13 Stat. 479, and in the act of March 2, 1867, c. 169, sec. 13, 14 Stat. 478. In the act of July 14, 1870, c. 225, sec. 6, 16 Stat. 257, the language was "income derived from any business, trade or profession carried on in the United States"; whilst in the act of August 27, 1894, c. 349, sec. 27, 28 Stat. 553, Congress reverted to the prior words, "any profession, trade, employment, or vocation." There is, of course, no ambiguity or uncertainty in the word "business," and the phrase "carrying on or doing business," and they are common forms of expression in tax laws: *e. g.*, *The Parker Mills* v. *The Commissioners of Taxes*, 23 N. Y. 242, and cases cited *infra*.

Another proposition advanced on behalf of the appellant is, that to impose a tax upon corporations and other joint stock companies or associations engaged in business with-

out imposing a similar tax upon individuals and ordinary partnerships is so unreasonable, arbitrary and discriminatory a classification that the tax must be declared unconstitutional. It is, of course, well settled that the states can tax corporations as a class without including individuals or partnerships, and also that the states may tax individuals and corporations at different rates. The argument that the tax should be declared unconstitutional and void because imposed only upon corporations and joint stock associations seems to be based upon the suggestion that such a classification for purposes of taxation is in violation of the Fifth Amendment of the Constitution, which provides that persons shall not be deprived of property without due process of law. In view of the fact that it has been held repeatedly that the taxation of corporations as a separate class is not in violation of the Fourteenth Amendment of the Constitution, it is difficult to perceive how an act of Congress taxing corporations as a separate class can be deemed to be in violation of the Fifth Amendment. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 410.

The grounds upon which state excise taxes imposed only upon corporations have been upheld by this court support equally the conclusion that Congress may similarly impose an excise tax upon corporations as a separate class. The court is so familiar with this proposition and with its own decisions on this point that we shall only cite the leading cases for convenience of reference: *The Delaware Railroad Tax*, 18 Wall. 206; *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Insurance Company* v. *New York*, 134 U. S. 594, 606;

New York State v. *Roberts*, 171 U. S. 658, 665; *Florida Central &c. Railroad Co.* v. *Reynolds*, 183 U. S. 471, 477; *Berea College* v. *Kentucky*, 211 U. S. 45, 54.

For similar reasons, the exemption of certain associations and corporations from the operation of the tax in the case at bar, does not render the tax unconstitutional. Congress can subdivide businesses for purposes of taxation, and it can impose an excise tax on certain kinds of business without imposing a similar tax upon other businesses. It is true that all corporations of the same class must be treated impartially and that a tax must apply uniformly to all corporations engaged in the same business under similar conditions, but the associations and corporations exempted from the tax imposed by the act of 1909 are essentially different in character from those that are subject to the tax. The associations and corporations that are exempted are not properly speaking engaged in "carrying on or doing business." At any rate, associations and corporations like those exempted by this act of Congress are exempt from taxation under the laws of nearly all the states. Therefore, this exemption was not arbitrary, unreasonable, oppressive, or capricious, and it should be sanctioned by the court. In fact, a comparison with the act of 1894 will show that the exemptions under that act were much more extensive than under the act of 1909, and there is no foundation in the case at bar for most of the criticism on this point of exemptions which applied to the earlier legislation.

II.

THE PROPER CONSTRUCTION OF THE ACT OF CONGRESS OF AUGUST 5, 1909.

As this court has repeatedly pointed out, and notably in the recent decision in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, if an act of Congress be reasonably susceptible of a construction that will avoid a conflict with the Constitution of the United States, such construction should be adopted. Mr. Justice White, delivering the opinion of the court in that series of important appeals, laid down the controlling rule as follows:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such a ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407."

The appellees, Home Life Insurance Company and its directors, submit that section 38 of the act of August 5, 1909, is susceptible of a construction which will avoid the grave and doubtful constitutional questions suggested in the numerous briefs filed on behalf of the

various appellants and will render the act clearly constitutional. According to this construction, the act imposes "a special excise with respect to the carrying on or doing business," to be assessed upon net income received "from all sources" in carrying on or doing business, but not upon income derived directly from United States, state, county or municipal securities, or from real and personal property not used or employed in business. Thus construed, the act avoids any conflict with express or implied constitutional limitations.

The Constitution provides that direct taxes shall be apportioned and that duties, imposts and excises shall be uniform throughout the United States. A tax on the rents or income of real estate is a direct tax within the meaning of the Constitution (*Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 583), and a tax on the income of personal property is likewise a direct tax (*ibid.*, 158 U.S. 601, 628). A tax upon income of United States bonds, which by the acts of Congress pursuant to which they were issued are expressly exempted from United States taxes, would be unconstitutional and void, because impairing the obligation of contracts or taking property without due process of law (see below, pp. 24–26). A tax upon income derived from state, county and municipal securities is beyond the taxing power of Congress because in conflict with implied restrictions resulting from the fundamental nature of our Union composed of sovereign and indestructible states. *Income Tax Cases*, 157 U. S. at pp. 583 *et seq.*; 158 U. S. at p. 630. Mr. Chief Justice Fuller on the rehearing said:

> "We have unanimously held in this case that, so far as this law operates on the receipts from municipal

bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution."

See also *Ambrosini* v. *United States*, 187 U. S. 1, 7.

An examination of the exact issues presented for decision in the *Income Tax Cases* of 1895 will show that those cases involved an income tax imposed on two trust companies under section 32 of the act of August 27, 1894 (c. 349, 28 Stat. 509), which read as follows:

"Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships."

It was this tax, as laid upon these two corporations, that was held to be partially a direct tax and, therefore, in violation of the Constitution, because not apportioned. No individual was before the court. Of course, the conclusion followed, *a fortiori*, that the similar tax imposed by section 27 of the same act as part of the same general scheme of taxation upon all citizens of the United States and upon all persons residing in the United States was likewise unconstitutional and void

in so far as it included a tax on the rents or income of real estate or on the income of personal property. But it was not held in either of these decisions that the act of 1894 was unconstitutional in so far as it applied to income derived from carrying on a business. On the contrary, it was conceded by counsel and recognized by the court that a tax on income derived from business or occupation would not be a direct tax but would be an excise. As Mr. Chief Justice Fuller said, in delivering the opinion of the court on the rehearing, 158 U. S. at p. 635:

> "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such."

It should be noted that section 27 of the act of 1894 (printed 157 U. S. at p. 434) specifically included not only a direct tax on income "derived from any kind of property, rents, interest, dividends, or salaries," but also an excise tax "on gains, profits and income . . . derived . . . from any profession, trade, employment, or vocation carried on in the United States or elsewhere." There can be no doubt that if the act of 1894 had merely imposed a tax on gains, profits and income derived by individuals from any profession, trade, employment, or vocation, or on net income derived by corporations from "the carrying on or doing business," the act would have been unanimously upheld as a valid excise tax.

Congress has acted upon the decisions of this court in

the *Income Tax Cases*, and has proposed for adoption by the several states a Sixteenth Article of Amendment to the Constitution, to read as follows:

> "Article 16. The Congress shall have power to lay "and collect taxes on income, from whatever source "derived, without apportionment among the several "States and without regard to any census or enumer- "ation."

There is, therefore, now pending before the people of the United States a proposal of the same Congress that passed the act in question to amend the Constitution so as to permit Congress to tax without apportionment incomes derived from real and personal property. Congress accepted the construction of this court that certain income taxes, *i. e.*, taxes on income derived directly from real or personal property, were direct taxes. Congress has proposed to amend the Constitution simply by providing that direct taxes on income need not be apportioned as all other direct taxes must be. The purpose of the amendment plainly was to meet the decision of the court in the *Income Tax Cases*. There was no need of an amendment to enable Congress to impose excise taxes on incomes derived from the carrying on of a business or occupation by individuals, partnerships, or corporations. It had been settled by this court that a tax upon income derived from a business or occupation was an excise and, therefore, need not be apportioned. See cases cited in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397. The act of August 5, 1909, was passed within two weeks *after* the submission by Congress of this proposed amendment. Under these circumstances, it does not seem reasonable to assume that Congress intended by this act to

impose an income tax on the income of corporations which would be partly a direct tax within the decision in the *Income Tax Cases*.

We submit, therefore, that the words "from all sources" found in the act of 1909 must be deemed to relate to and to be qualified by the preceding words declaring the intention of Congress to impose "a special excise tax with respect to the carrying on or doing business," because otherwise it must be held that Congress intended, in defiance of the decision of this court in the *Income Tax Cases*, to impose a tax upon income derived from non-taxable securities and from real and personal property, and it must be held also that the action of Congress in proposing a Sixteenth Amendment to the Constitution was meaningless.

To construe the present act of Congress as not applicable to income derived from United States bonds and state securities, or to rents or other income derived directly from real and personal property, would be in accordance with the well settled rule of statutory construction that a general provision must be deemed limited by special statutory or constitutional provisions. Thus, the act of 1909 should be construed as limited by the special statute providing that United States bonds shall not be taxed. Again, the act of 1909 should be construed as subject to the constitutional limitation that bonds issued by the state governments shall not be taxable directly or indirectly by Congress. For the same reason, the act of 1909 should be deemed limited by the constitutional requirement that a tax upon income derived directly from real or personal property must be apportioned among the states. This

familiar rule of construction is illustrated by such cases as *Kepner* v. *United States*, 195 U. S. 100, 125, and *United States* v. *Nix*, 189 U. S. 199, 205.

If the statute be construed as imposing a tax only upon income derived from carrying on business, then income derived through the use of real estate and other property in carrying on business would be subject to the tax, though this real estate or other property, or income derived therefrom, could not be taxed directly; but income derived from investments in real estate or other property not employed in business would not be subject to the tax.

The test in each case is whether the income was received as direct income from property or as income from carrying on a business in which the property was used. Thus, rents of real estate collected from others could not be taxed except by a direct tax apportioned according to the Constitution, but income derived through the use of real property in carrying on a business could be taxed by an excise. A corporation owning real estate used in conducting its business, such as the plant of a manufacturing company, the hotel of a hotel company, the mines of a mining company, the right of way, terminals and yards of a railroad, or any other real estate employed in business and not leased to others, would be taxable by an excise tax; but rents collected upon any part of the real property leased to others would not be taxable except by a direct tax. Similarly, an excise tax could be imposed upon the income derived by a corporation from profits in its business of buying and selling real property, but not upon rents collected upon real property owned by the corporation and leased to others. Income

received by a corporation as interest on bonds owned by it or upon loans of moneys to others would not be taxable except by a direct tax, but a tax upon profits derived from carrying on the business of dealing in securities or loaning money on commission would be an excise tax.

The decision in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 416, is controlling upon this point. Mr. Justice Harlan there said:

> "But, clearly, neither interest paid to the plaintiff on its deposits in bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume, on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business; and whether they would be divided among stockholders or be used in the further prosecution of the business was for the plaintiff to determine. They could have been used for purposes wholly distinct from the business of refining sugar. We are of opinion that the receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business of refining sugar, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with that business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. In the absence of any showing to the contrary, it must be assumed that the declaration of the receipt of dividends on such stocks was wholly apart from the particular business in which the holder of the stock was engaged."

The exclusion of income received as dividends upon stock of other corporations, &c., does not imply that no other deductions were intended by Congress. The exclusion of income received as dividends on stock

of other corporations was inserted in the act for the purpose of avoiding double taxation, in the case of holding companies whose whole *business* frequently is to acquire stocks. Congress presumably deemed it unfair to compel a holding company to pay a tax upon income derived from dividends of other companies which had already paid the tax, although as a mere question of constitutional power, Congress could have imposed such double taxation if it had seen fit to do so. There is, therefore, no force in the argument that the express exclusion of dividends implies that Congress contemplated or intended that this should necessarily be the only income to be excluded.

Under the laws of many of the states, which authorize the formation of corporations for any lawful business, corporations may be organized for the purpose of holding or dealing in the bonds and stocks of other corporations and for the purpose of holding and dealing in real estate. Innumerable corporations have been organized for these purposes, as is shown by the reports on file under the act of August 5, 1909. In New York, for example, such corporations may be organized under the Business Corporation Law, ch. 12, laws 1909, entitled "An act relating to Business Corporations, constituting Chapter Four of the Consolidated Laws." This statute authorizes the creation of "a stock corporation for any lawful business purpose or purposes," and under this provision many companies have been organized either to hold stocks or to hold real estate. So, in New Jersey, the statute authorizes the formation of corporations for any lawful purpose, and, as is well known, it was under this

New Jersey statute that the Northern Securities Company was organized in November, 1901, for the purpose of holding the securities of other corporations. *Northern Securities Company* v. *United States*, 193 U. S. 197.

If a corporation be organized for the purpose of carrying on the business of holding securities or real estate, there is no reason why it should not be subject to taxation upon that occupation or business, or upon the income derived therefrom, though the property with which it carried on its business might not be taxable as separate objects of taxation, and though individuals might not be similarly taxed. *People ex rel. Vandervoort, &c., Co.*, v. *Glynn*, 194 N. Y. 387, 389. Hence, the reason why Congress inserted the provision in question, because otherwise holding companies would have had to pay on dividends collected, that being their sole or principal business purpose.

Although exceptions or exclusions are sometimes construed in such manner as to extend the general clause and make it more comprehensive than would otherwise be likely, this rule is not universal and should not be carried too far. Thus in *Baggaley* v. *Pittsburg & Lake Superior Iron Co.*, 90 Fed. Rep. 636, 638, Mr. Justice Lurton, speaking for the Circuit Court of Appeals, Sixth Circuit, among other things, said:

> "We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court

to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible. *Tinkham* v. *Tapscott*, 17 N. Y. 141."

See also *Mullins* v. *The Treasurer of the County of Surrey*, 5 Q. B. D. 170, 173, 174, and *The West Derby Union* v. *The Metropolitan L. Assurance Society*, [1897] A. C. 647, 652, 655.

This rule is analogous to the rule which obtains in the case of provisos. These are often interpreted as not in any way limiting or extending the principal clause. *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *American Express Co.* v. *United States*, 212 U. S. 522, 534.

It may be suggested that the excise in question should not be regarded as a tax on income derived directly from property or non-taxable securities, but should be construed simply as a business or license tax measured by the entire net income whether or not derived from business; in other words, that the words "equal to" convert what otherwise would be a tax on income into something essentially different. This line of argument is said to find support or warrant in *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, and *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305. These cases, however, did not present analogous conditions. The right of a state to impose franchise or business taxes on corporations is based not alone on the taxing power

but on the power to regulate corporations and the right or privilege to carry on business in corporate form, which it may grant or withhold at its discretion, even arbitrarily. As the court declared in the *Home Ins. Co.* case (at p. 600): "No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows." But as later decisions of the court have made very clear, the cases above cited do not sustain the proposition that a state may impose an excise business tax measured wholly or partly by income from objects not subject to its power of taxation. *Galveston, Harrisburg, &c., Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 30, *et seq.*; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 70. Addressing himself to this very point in the *Texas* case, *supra*, Mr. Justice Holmes said:

> "The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone."

Certainly, the act of 1894 declared unconstitutional in the *Income Tax Cases*, would not have become constitutional if Congress had simply inserted the words "equal to" or "equivalent to," or had declared that it was an excise. The court would have said, as Chief Justice Marshall said in *Brown* v. *Maryland*, 12 Wheat. 419, 444:

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the sub-

> stance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing."

But if Congress had changed the act of 1894, so as to exclude income derived from real and personal property and to confine the tax to income derived "from the carrying on or doing business," whether of individuals, partnerships or corporations, this would have changed the substance and not merely the form of the statute by making the tax wholly an excise within the power of Congress instead of partly an excise and partly a direct tax.

The United States bonds referred to in the bill of complaint (fol. 3) and owned by the Home Company were issued under the act of January 14, 1875, 18 Stat. 296, and the act of July 14th, 1870, 16 Stat. 272. The latter provides as follows:

> "Said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions."

On the face of the bonds held by the defendant company is the following:

> "The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority."

It would be an impairment of this contract if the United States should now directly or indirectly tax either the principal or the interest on these bonds. Although the

Constitution *eo nomine* does not prohibit the United States from impairing the obligation of contracts, there ought to be no doubt that the provision of the Fifth Amendment against depriving any person of property without due process of law will be found sufficient. Chief Justice Waite, speaking for the court in the *Sinking Fund Cases*, 99 U. S. 700, 718, used the following language:

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

The dissenting opinions of Justices Strong, Bradley and Field were even more emphatic upon this point, and the same views were reiterated in *United States* v. *Union Pacific Railway*, 160 U. S. 1, 33, where Mr. Justice Harlan, in delivering the opinion of the court, quoted with approval the above extract from the *Sinking Fund Cases*.

The Treasury Department will find no difficulty in enforcing the act if it be now authoritatively construed as applying only to income derived from the carrying on or doing business and as not including income derived from United States bonds and other non-taxable securities or from real and personal property not employed in business. Under state laws imposing taxes upon the capital of corporations employed in business, it is often necessary to make similar inquiry into the character and use of their property. *People ex rel. Singer Mfg. Co.* v. *Wemple*, 150 N. Y. 46; *People ex rel. Chicago Junction, &c., Co.* v. *Roberts*, 154 N. Y. 1; *People ex rel. Niagara River Hydraulic Co.* v. *Roberts*, 30 A. D. (N. Y.) 180, affd. 157 N. Y. 676; *People ex rel. Fort George Realty Co.* v. *Miller*, 179 N. Y. 49; *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119; *Coal & Mining Co.* v. *Ladd*, 160 Mo. 435; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *In re Alabama R. Co.*, 1 Fed. Cas. 271; *Oakland Sugar Mill Co.* v. *Wolf Co.*, 118 Fed. Rep. 239; *Gilchrist* v. *Helena, &c., R. Co.*, 47 Fed. Rep. 593.

III.

As to severability.

Even though the court should hold that the words "from all sources" must be construed as including income derived directly from non-taxable securities and from real or personal property as well as income derived from carrying on or doing business, and that the tax is unconstitutional as to income derived from non-taxable securities and from real or personal property, it does not follow that the entire

tax must be declared unconstitutional and void. On the contrary, the tax may be held invalid in so far as it is unconstitutional, and it may be upheld and enforced in so far as it is a valid excise upon income derived from "the carrying on or doing business."

The rule applicable to a case of this character was stated forcibly in the very recent case of *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87, 96. Mr. Justice Day, in delivering the opinion of the court, among other things said:

> "It is hardly necessary to repeat what this court has often affirmed, that an act of Congress is not to be declared invalid except for reasons so clear and satisfactory as to leave no doubt of its unconstitutionality. Furthermore, it is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality; and, whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid."

The amount of income derived by corporations from investments in United States, state, county and municipal securities and in real and personal property, must be small in comparison with the net income derived from the carrying on of business. It is a matter of common knowledge, capable of being verified by reference to public records in the various states and to the reports of the Census Bureau, that comparatively few corporations derive a large part of their net income from investments, dividends from stock not being included. A comparatively small amount of the income of the four hundred thousand corporations subject to the tax is derived from non-taxable securities or from sources that can be reached only by a direct tax. For

example, the Coney Island and Brooklyn Railroad Company, defendant in No. 751, derives substantially its entire income from its railroad business (fol. 9).

The court will recall that the act of 1894, construed in the *Income Tax Cases* (157 U. S. 429; 158 U. S. 601), differed materially from the act of August 5, 1909. In the former act, there was a general scheme of taxation imposed at the same rate on individuals, partnerships and corporations. The tax was imposed upon income derived by individuals "from any kind of property, rents, interest, dividends or salaries" as well as upon income derived "from any profession, trade, employment, or vocation," or "from any other source whatever." It was evident that income from real and personal property constituted the largest part of the anticipated revenue, and that if this were eliminated, it "would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor" (158 U. S. at p. 637). The court declared that it could "not believe that such was the intention of Congress," and, considering the scheme of taxation as a whole, it was held that the valid part, that is, the excise tax "on business, privileges, employments, and vocations," could not be separated without re-writing the act and giving it an operation which no one could reasonably say had been intended by Congress.

The act of 1909 is entirely different. It does not purport to impose both a direct tax and an excise tax as inseparable parts of one whole scheme. On the contrary, it plainly declares the purpose to be to lay only an excise tax.

If Congress had been advised that it could not tax income from United States bonds, state, county and municipal securities, or from real or personal property not employed in business, and that the tax would fail to that extent, it is probable that the act of 1909 nevertheless would have been passed in its present form. There is no necessity to re-write this statute in any particular. It is only necessary to hold that the excise tax therein provided for applies only to income from all sources subject to an excise and does not include income not taxable by the national government, or derived from property that could not be taxed except by apportionment among the states. The language of this act ought not to be construed as evidencing an intention on the part of Congress to impose a direct tax and also an excise tax, as was done in the act of 1894, in the teeth of the declaration of Congress of its purpose to impose only "a special excise tax with respect to the carrying on or doing business by such corporation."

The reasoning of Mr. Chief Justice Fuller in the *Income Tax Cases* seems to us conclusive in favor of the contention that the unconstitutional part of the tax now under consideration is separable, and that the tax may be enforced as an excise imposed only upon net income derived from all sources in the carrying on or doing business. See also as to severability: *Allen* v. *Louisiana*, 103 U. S. 80, 84; *Huntington* v. *Worthen*, 120 U. S. 97, 102; *N. Y. Central, &c., R.R.* v. *United States*, 212 U. S. 481, 496; *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87, 96, *supra*.

Conclusion.

For the reasons stated above, it is submitted that the act of August 5, 1909, properly construed, is not in conflict with or repugnant to any express or implied constitutional limitation, and that the judgment of the court below should, therefore, be affirmed.

Washington, March 14, 1910.

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Of counsel for appellees.

Office Supreme Court U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 410

FRANCIS L. HINE, APPELLANT,

vs.

HOME LIFE INSURANCE COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEES IN REPLY TO ARGUMENT FOR THE UNITED STATES.

WILLIAM D. GUTHRIE,
VICTOR MORAWETZ,
Of Counsel for Appellees.

WASHINGTON, March 18, 1910.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 752.

FRANCIS L. HINE, APPELLANT,

versus

HOME LIFE INSURANCE COMPANY ET AL.

Brief of Appellees in reply to argument for the United States.

We agree with counsel for the United States that Congress has power, as in the act of August 5, 1909, to treat corporations and unincorporated joint-stock associations organized for profit, etc., and insurance companies as a separate class for purposes of taxation by imposing upon them a business tax not applicable to individuals or partnerships. We agree also that the exemption of certain corporations and organizations not organized for profit or to carry on business was reasonable and proper. In this respect, the act of 1909 differs from the act of 1894, where, for example, the exemption of *mutual* insurance companies, while *stock* insurance companies were taxed, withdrew and freed from the burden of the tax

over $1,000,000,000 of investments in the State of New York alone.

However, we differ with the counsel for the United States in regard to the power of Congress to levy an excise business tax measured partly by income derived from business and partly by income derived from non-taxable securities and real and personal property.

I.

The argument of the United States is that as Congress has constitutional power to impose upon every corporation, joint-stock company, or association of the character described in the act of 1909 "a special excise tax with respect to the carrying on or doing business," it may measure the tax by the entire net income, including not only business income from all sources, but also income derived directly from investments in property, such as interest on United States, state, and municipal bonds, rents of real estate leased to others, and interest, dividends, etc., derived from other investments. This contention is based principally upon the proposition that corporations and joint-stock corporations organized for profit are necessarily organized for a business purpose, and, hence, that all their property, of whatever kind or nature, and however held or employed, must be deemed to be held for business purposes and used in business.

From these premises, the conclusion is drawn that any tax upon the income of a corporation or joint-stock association is in its nature essentially and always an excise on business. The proposition will, perhaps,

be best stated in the language of the brief for the United States, as follows (p. 42):

> "Indeed, as to both capital and surplus, a corporation (formed for profit and therefore for the conduct of a business described in its charter) *has no right to hold any property except for the purposes of the business,* and therefore as business assets. It cannot legally be a mere proprietor of property unconnected with the business. An attempt by the corporation to hold extrinsic property would be an abuse of its charter, and expose it to forfeiture of that charter. No corporation can claim that it holds property in any other way than as business assets, when it has no right so to hold property. It is legally estopped from questioning the business character of its assets."

The learned counsel then proceed to argue, in substance (pp. 43, 44), that for the same reasons unincorporated joint-stock associations and insurance companies may likewise be treated by the *National Government* as not entitled to hold any property whatever except as used in their respective businesses and as estopped from questioning the business character of their assets.

But, in making this suggestion, the learned counsel of the United States must have overlooked the fact that the court held in the *Income Tax Cases* of 1895 that a tax on income derived by corporations—namely, The Farmers' Loan and Trust Company and The Continental Trust Company—from municipal bonds and other property, real or personal, was a direct tax, and that it was this feature that invalidated the act of 1894.

If, as now suggested, a tax on the net income of corporations, etc., is essentially an excise, even though the income be derived partly or wholly from non-taxable securities, or property only taxable by the rule of apportionment, then the decisions of 1895 were erroneous, and everybody at that time wholly overlooked the real point involved; for according to the position now taken by counsel for the United States the tax was wholly an excise and not, as held by the court, partly a direct tax and partly an excise. It has now been discovered for the first time that, after all, the tax under the act of 1894 was wholly an excise business tax, because every dollar of income of every corporation must necessarily be deemed income derived from carrying on business. In other words, the suggestion is that the court and all the counsel failed to perceive that the true rule is that any tax upon the income of a corporation, joint-stock association, unincorporated company, or, indeed, partnership, is in its essence a business tax, whether or not the income be derived directly from non-taxable securities or other property not actually used in business, simply because every partnership, company, association, or corporation is organized for the purpose of carrying on or doing some business.

It should be observed also that if the argument now advanced on behalf of the United States be sound, many of the decisions of the court sustaining excise taxes on corporations have proceeded on entirely erroneous reasoning. The recent case of the *Spreckels Sugar Refining Company* is an example (192 U. S. 397, 410, 417). The company in that case was organized for the purpose of carrying on or doing "the busi-

ness of manufacturing sugar," and had no other business. According to the present view of the Government, the company could not legally have been "a mere proprietor of property unconnected with the business," as "no corporation can claim that it holds property in any other way than as business assets when it has no right so to hold property," and the tax was to be "equivalent to" a percentage "of *all receipts* of such persons, firms, and corporations and companies *in their respective business.*" Yet, the court held in that case that income derived from property "wholly distinct from the business of refining sugar" was not taxed, and failed to appreciate that the Spreckels Company was "legally estopped from questioning the business character of its assets."

Moreover, the court will not fail to notice that if a business excise on corporations or joint-stock associations may be measured by income derived from nontaxable property, the same rule must apply to individuals and partnerships, for the taxing power of Congress is the same. The result of the Government's contention must, therefore, be that Congress may impose upon individuals and partnerships a business excise on every business, profession, trade, employment, or vocation carried on in the United States or elsewhere, and measure that tax by the whole wealth of the individual or partnership. Under this view, the act of 1894, section 27, could have been sustained as to 99 per cent of its operation by simply treating it as an excise *equivalent to* two per cent of the "income derived from any profession, trade, employment, or vocation." Probably not over one per cent of the property-owners

of the United States are engaged in no profession, trade, employment, or vocation. But, in any view, according to the present argument of the Government, Congress had only to change slightly the wording of sections 27 and 32 of the act of 1894 to transform what the court had declared to be *mostly* a direct tax into wholly an excise.

II.

We concede that the courts cannot interfere with the discretion of Congress in the exercise of the taxing power and that the courts cannot declare a tax unconstitutional because burdensome, even though it be so high as to become destructive in its effect. If any point of constitutional law has been settled, that point ought to be no longer open. *McCray v. United States*, 195 U. S. 27. In these respects, the power of the legislative branch of the Government is subject only to the requirement that direct taxes must be apportioned, that duties, imposts and excises must be geographically uniform, and that a tax law must operate equally and impartially on all of the same class similarly situated.

But if Congress should select a certain profession for taxation, as, for example, that of lawyers (in 1861, 1864, 1865, 1867, 1870, and 1894 every profession was included), then we assert that it cannot provide that every lawyer shall pay an occupation tax measured not by income derived from the practice of his profession, but by income derived from his private fortune; in other words, we assert that an occupation tax cannot be measured by the wealth of those engaged in the occupation. Congress may impose upon lawyers

a fixed occupation tax payable by all alike, or a tax measured by a percentage of professional income, but it cannot impose upon lawyers an occupation tax measured by income drawn from their private fortunes. The same reasoning applies to all trades, employments and vocations comprised in the generic term "business."

Let us suppose that Congress had selected the business of carrying on a hotel, or manufacturing tobacco, or publishing periodicals, or distilling spirits: could the tax in any such case be measured not by the income derived from the business or the capacity of the plant, but by the income derived by the owner from all his property, in other words, by his entire wealth? Would not such a measure be obviously unfair? Would not such a tax be as invalid as a business tax measured by size or color of those engaged in the business, or by mile posts, or by any other fanciful, capricious, and arbitrary standard? The court would again declare, as Mr. Justice Brewer declared in the now leading case of *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154:

> "The State * * * may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

See also *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56 and *Southern Railway Co.* v. *Greene*, decided February 21, 1910.

III.

In support of our contention that the correct construction of the act of 1909 is that the tax is to be measured by net income derived "from all sources" in "the carrying on or doing business," without including income derived directly from non-taxable securities or other property not used in carrying on or doing business, it will be convenient to refer to a few passages from the brief for the Government, the significance of which might otherwise be lost sight of. The candid concessions on behalf of the Government tend to narrow the questions to be considered by the court. Thus, the learned counsel state as follows, at page 29:

> "A tax upon business is not a tax imposed upon property 'solely by reason of its ownership;' for, if the property is not put into business use, no tax falls upon it or its income."

At page 36:

> "*No tax is imposed in any way or on anything unless business is actually done.* The statute lays the tax in terms 'with respect to the carrying on or doing business,' whether by a corporation, or joint stock company, or insurance partnership."

Again, at page 40 we find:

> "(*a*) Obviously, the words 'all sources' in the act mean, so far as they relate to property rather than activities of the business, such property as is engaged in or connected with the business. In other words, they relate only to what may be described generally as 'business assets.' Such is the natural and perhaps unavoidable result of the statement of the statute that the tax is laid 'with respect to the carrying on or doing business' by the corporation, joint-stock company, or insurance company. It would be unnatural, even though permissible, to measure a tax 'with respect to the carrying on or doing business' by consideration of income from other than business assets, even in case of a business done by an individual or a partnership; and a corporation or joint-stock company, as will soon be argued, has no property which is not legally and practically an asset of the business. Beyond this, if the constitutionality of the statute be dependent in any way upon exclusion of income from other than business assets in the computation of the net income which measures the tax on business, that necessity is in itself a sufficient and controlling reason for interpreting the language of the statute, viz., these words 'all sources,' in a way that will make the statute constitutional rather than unconstitutional. No citation of authorities is necessary on that point. Such authorities abound, and are but particular illustrations of the unquestioned maxim—*Benignae faciendae sunt interpretationes chartarum, ut res magis valeat quam pereat.*"

And the same concession is repeated at page 150, as follows:

> "Yet it is entirely possible to construe the words 'net income received from all sources' as relating only to income derived from property actively employed in the current operations of the business. That construction can be gathered not only from the rule that Congress must be taken to have intended what is constitutional, but also from the express statement of the statute that the tax is laid on companies 'organized for profit,' and is laid specifically 'with respect to the carrying on or doing business.'"

In construing the words "from all sources" to mean "from all sources in carrying on or doing business," we are following "what is sometimes known as Lord Tenderden's Rule, that where particular words of description are followed by general terms the latter will be regarded as referring to things of a like class with those particularly described—*ejusdem generis*" (Mr. Justice Brewer in *United States* v. *Metcalf*, 215 U. S. 26, 31). This is but an application of the general principle of interpretation and construction, *noscitur a sociis*.

IV.

The various cases before the court serve to show how the act of 1909 would operate if construed so as to eliminate income from non-taxable securities and income derived directly from investments, which can be taxed only by a direct tax apportioned among the states.

No. 753, the case of the Northern Trust Company of Illinois, presents somewhat the same situation as the cases of Pollock and Hyde against the New York trust companies in 1895 (157 U. S. 429). The net income of the Northern Trust Company amounts to more than $205,000 per annum. Of this about $9,000 represents income and rents derived from real estate and $50,000 interest on municipal bonds (record in No. 753, fol. 3). Deducting these items, the net income subject to the tax is $146,000.

In 757, the Park Realty Company owns real estate in the city of New York, and on this property a hotel, known as the Hotel Leonori, has been erected, which has been leased at a fixed annual rental of $55,000 (record in No. 757, fol. 6). The company has no other income than the rental of this real estate. If the property were owned and leased by an individual or partnership a tax on these rents would be indisputably a direct tax. It is no less a direct tax because the property is owned by a corporation which leases the hotel to an individual, who carries on the business of keeping a hotel. If it had been leased to a corporation, the corporation would have been liable to pay the present tax on that business.

In 784, the case of the Broadway Realty Company, a different situation is presented. It may be that that company is engaged in the business of managing an office building, and that its income is the product of that business, just as the income of a hotel-keeper from renting rooms would be the product of the business of keeping a hotel.

In 800, it does not appear for what purpose the Clark

Iron Company was incorporated. The bill of complaint merely shows that it is a Minnesota corporation and entitled to own and hold real estate within that state (record in No. 800, fol. 3). However, it does appear that the company leases its ore lands to other parties, and that the lessees carry on the mining operations. The income of the company is derived from rents and royalties resulting from the mining operations or business conducted by its lessees. Probably, there is no difference between its ownership as lessor and the ownership of an individual or partnership, but the case may have to be decided on its particular facts, as the actual operations of the company may constitute the carrying on of a business, and thus be differentiated from the simple case presented in 757.

In 819, it appears that the Boston Wharf Company, a Massachusetts corporation, carries on the business of dockage and wharfage (record in 819, fol. 3), and presumably was organized for that purpose. It has real estate of the value of $5,000,000, and so far as appears all of it is employed in its business. The net income derived from dockage and wharfage will, of course, be income derived from the carrying on or doing business, even though the plant be wholly real estate, just as the net income of a hotel, a manufacturing company, or a railroad may all be derived from the use and employment of real estate *in carrying on or doing business.*

The position of an owner who leases real property to another at a rental, as in No. 757, is entirely different from that of an owner who himself uses his real estate in the conduct of his business.

V.

The brief for the United States refers in various places to the practicability of separating any part or application of the statute which may be found unconstitutional, and the point is discussed at length at pages 169 *et seq.* With this view, we agree, and the rule is nowhere more emphatically stated than in the quotation from *Field v. Clark*, cited on page 170.

It is only necessary to add that the well-informed representatives of the Government state that only a comparatively small part of the income of companies engaged in business for profit is of a kind to which the objections reach (pages 171, 172), and that the effect upon the total revenue will be insignificant (page 173), although, of course, it may be of vital importance in isolated cases. There seems to be no reason for doubting that if the tax of 1909 be now authoritatively construed as measured only by net income from all sources in carrying on or doing business by corporations and unincorporated joint stock associations and insurance companies, no practical difficulty will be found in ascertaining the net income derived from business, or in excluding income derived from nontaxable securities or only taxable by Congress under the rule of apportionment.

In our principal brief we suggested that the decree of the Circuit Court should be affirmed, rather than reversed, as in the original hearing in the *Income Tax Cases*. We made this suggestion because, according to our contention, the act properly construed imposes a

constitutional tax. The amount of the non-taxable income cannot be satisfactorily determined from the record in our case or, so far as we can judge, from the records in most of the cases to be submitted at the same time. As is suggested in the brief of the United States, the true answer must be given on the special facts of each case (p. 58). The court may well conclude to affirm even if the statute be held to be partly unconstitutional, and leave the several companies to pay under protest any amount which they claim is based on non-taxable income. To avoid injury through the technical rule of *res adjudicata*, the affirmance should be without prejudice to the right of the several companies to contest their liability to pay any part of the tax. in respect of income not derived from business. This will not necessarily lead to any great amount of litigation, for in most cases the Government undoubtedly will allow the necessary deductions without litigation.

Washington, March 18, 1910.

WILLIAM D. GUTHRIE,
VICTOR MORAWETZ,
Of counsel for Appellees in No. 752.

Supreme Court of the United States.

OCTOBER TERM, 1910. No. 410.

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FRANCIS L. HINE, Appellant

versus

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REHEARING.

BRIEF ON BEHALF OF APPELLEES.

WASHINGTON, D. C., JANUARY, 1911.

WILLIAM D. GUTHRIE,
VICTOR MORAWETZ,
HOWARD VAN SINDEREN,
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REHEARING.

BRIEF ON BEHALF OF APPELLEES.

This is an appeal from a final decree of the Circuit Court of the United States for the Southern District of New York, sustaining a demurrer interposed on behalf of the defendant Home Life Insurance Company and its directors and dismissing the bill. The controversy arises under section 38 of the act of Congress entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, c. 6, 39 Stat. 112. The text of section 38 is printed in full in the appendix to this brief and also the text of sections 27 to 37, inclusive, of the act of Congress of August 27, 1894 (28 Stat. 509, c. 349). The suit was brought by the complainant, Francis L. Hine, as a stockholder and policy-holder, to enjoin the defendant

company and its directors from complying with the law on the ground that the tax was unconstitutional and that its payment would be an *ultra vires* act and a waste of the funds of the defendant company, etc. The facts are not in dispute, and are correctly stated in the bill of complaint and in appellant's brief at pages 5–9. The defendant and its directors were advised that the act of Congress, if construed as being limited to a tax upon income derived directly from the carrying on of business, was a valid excise within the taxing power vested in Congress by the Constitution of the United States.

The Home Life Insurance Company is a life insurance company incorporated under the laws of the State of New York, and has a capital stock of $125,000, and assets of approximately $2,000,000 (fol. 2). The company owns real estate of the value of $1,643,609; United States Government bonds to the amounts of $11-193; bonds of the State of New York to the amount of $109,500; municipal corporate stock of the City of New York to the amount of $102,160; bonds of other municipal corporations within the United States to the amount of $53,800; bonds and stocks of solvent corporations incorporated under the laws of the United States or of one or more states, to the amount of upwards of $10,000,000; and real estate bonds and mortgages to the amount of $6,105,030 (fol. 3). The net income of the company for the year ending December 31,1909, amounted to about $450,000, and a large part of this income was derived from the securities hereinbefore mentioned (fol. 4).

Since the original argument at the last term, the appellee Home Life Insurance Company has paid the

tax for the year 1909 under due protest. This tax was levied not only on income derived from the business of life insurance, but on income derived directly from real and personal property and United States and municipal bonds. The payment under protest has not terminated the controversy or adversary litigation between the parties. The tax is a permanent one, accruing from year to year, and the right of the complainant to enjoin its continued voluntary payment as an *ultra vires* act is still a matter in controversy and is exactly the same to-day as it was when the bill was filed and the prior hearing was had. Any decision rendered would be controlling as to future years so long as the act of August 5, 1909, remained in force. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 395, 398, 401.

There are three contentions before the court, viz.:

1. On behalf of the appellant, it is contended that the act of August 5, 1909, is wholly unconstitutional in so far as it imposes a tax upon the income of corporations.

2. On behalf of the United States, it is contended that the act imposes a valid tax not only on income derived from business sources, but on income derived directly from real and personal property and from United States and municipal bonds.

3. On behalf of the appellees, however, it is contended that the act properly construed imposes an excise tax only on income derived from the carrying on or doing business, and does not impose a tax on income derived directly from real and personal property and from United States and municipal bonds.

The argument in support of the contention of the appellees may be divided as follows for convenience of discussion:

I. A tax upon income derived from the carrying on or doing business is an excise and not a direct tax within the meaning of the Constitution.

II. Congress cannot constitutionally impose an excise tax measured by non-taxable income.

III. The act of August 5, 1909, should be construed as imposing an excise tax only upon income derived from the carrying on or doing business.

IV. Is the act of August 5, 1909, severable?

I.

A TAX UPON INCOME DERIVED FROM THE CARRYING ON OR DOING BUSINESS IS AN EXCISE AND NOT A DIRECT TAX WITHIN THE MEANING OF THE CONSTITUTION.

The act of Congress of August 5, 1909, c. 6, 39 Stat. 112, which imposes the tax in question, reads as follows:

> "Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or in-

surance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

The Constitution of the United States provides in Article I as follows:

Section 2, par. 3. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers."

Section 8, par. 1. "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all

duties, imposts and excises shall be uniform throughout the United States."

Section 9, par. 4. "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

It is no longer open to question that a tax upon the carrying on or doing business or upon the net income derived from the carrying on or doing business is an excise and not a direct tax within the meaning of the Constitution. *Pacific Insurance Company* v. *Soule*, 7 Wall. 433, 443; *Railroad Co.* v. *Collector*, 100 U. S. 595, 598; *Springer* v. *United States*, 102 U. S. 586, 598; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 411; *South Carolina* v. *United States*, 199 U. S. 437, 454. It is likewise no longer open to question that the constitutional provision that excises shall be uniform throughout the United States merely requires geographical uniformity. *Knowlton* v. *Moore*, 178 U. S. 41.

The bill of complaint in the case at bar shows that a part of the income of the Home Life Insurance Company is derived from sources which are not taxable by Congress except under the rule of apportionment. Thus, it derives income from investments in real and personal property as well as from investments in bonds of the State of New York, corporate stock of the City of New York and bonds of other municipal corporations within the United States (fols. 3–4). A tax upon income derived directly from any of these sources is clearly unconstitutional unless apportioned, as was held in the Income Tax Cases of 1895, *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 583; rehearing 158 U. S. 601, 628.

In *Knowlton* v. *Moore*, 178 U. S. 41, 81, the court was

called upon to analyze and declare the exact question decided in the *Pollock* case. In so doing, the following language was used (p. 82):

> "Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned."

Of course, the fact that the court thus spoke of taxes on "persons" does not warrant the suggestion that similar taxes on corporations would be of a distinctly different nature, or that what would be a direct tax if imposed on persons would become an indirect tax or excise if imposed on corporations. The *Pollock* and *Hyde* cases before the court in 1895 involved only the property and income of corporations, and not that of persons, and, hence, the case at bar cannot be distinguished from them upon this point.

Mr. Chief Justice Fuller in speaking of municipal bonds further said in the *Pollock* case (158 U. S. at p. 630):

> "We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution."

See also *Ambrosini* v. *United States*, 187 U. S. 1, 7.

It should be equally clear that Congress may not tax United States bonds and particularly those issued under the acts of July 14, 1870, 16 Stat. 272, and January 14, 1875, 18 Stat. 296, which bonds declare on their face that "the principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority." Although it is true that the Constitution does not expressly prohibit the United States from impairing the obligation of contracts, there ought to be no longer any doubt that the provision of the Fifth Amendment, that no person shall be deprived of property without due process of law, is sufficient to prevent any such impairment or destruction of contract rights. *Sinking-Fund Cases*, 99 U. S. 700, 718; *United States* v. *Union Pacific Railway*, 160 U. S. 1, 33.

Within the ruling in the *Pollock* case, there can be no doubt that if the act of Congress now before the court had in so many words laid a tax on income derived from real and personal property and from municipal bonds, it would have been clearly unconstitutional, because not apportioned. The question now presented, therefore, is whether or not such income can nevertheless be indirectly taxed by means of a so-called special excise tax upon the carrying on or doing business by corporations, in other words, by merely changing the name of the tax. To repeat, both of the Income Tax Cases of 1895, that is, *Pollock* v. *Farmers' Loan and Trust Company* and *Hyde* v. *Continental Trust Company*, 157 U. S. 429 and 654, were cases which involved only the income of corporations, and it was such corporation income derived

directly from real and personal property which was then held to be non-taxable by Congress except by a direct and apportioned tax. The nature and essential characteristic of such a tax cannot be changed by merely calling it by another name. As Mr. Chief Justice Fuller said in the *Pollock* case (157 U. S. at pp.581, 583):

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.' . . .
>
> "But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the Nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property."

Nor can the nature of the tax imposed by the act of

August 5, 1909, be changed by the mere fact that it is imposed only upon corporations, joint stock companies and associations organized for profit, with a capital stock represented by shares, and upon insurance companies. If a tax imposed upon individuals would be a direct tax within the meaning of the Constitution, a similar tax imposed upon corporations, joint stock associations, or insurance companies of any class, must be equally a direct tax; and so, also, if a tax imposed upon individuals would be an excise within the meaning of the Constitution, a similar tax imposed upon corporations and other joint stock companies organized for profit, or upon insurance companies, must be equally an excise.

The constitutional provisions conferring upon Congress power to impose taxes make no distinction between corporations and individuals. Indeed, corporations are not mentioned in the Constitution. The power to tax private corporations organized under state laws is co-extensive with the power to tax individuals and flows from exactly the same constitutional provisions as apply to individuals. Therefore, Congress cannot impose upon corporations, or upon companies or associations of any class, an excise tax that it cannot impose upon individuals, and it cannot impose upon individuals an excise tax that it cannot impose upon corporations and other companies or associations. This ought to be a self-evident proposition. If not, where is the power to tax corporations?

It is contended by the appellant that the act of August 5, 1909, in so far as it taxes corporations, necessarily imposes a franchise tax, and that Congress cannot impose a franchise tax upon state corporations. The theory seems

to be that as the right or franchise to carry on business in corporate form is conferred by the state, every state corporation is to be deemed an instrumentality of the state governments, and that, therefore, a tax upon them would interfere with the sovereignty of the states. In the final analysis, does not this argument mean that Congress cannot tax state corporations at all even if federal corporations and individuals are similarly taxed? And is this argument to be carried to its logical conclusion, namely, that every business and occupation in the United States can be taxed by Congress by means of an excise, except businesses or occupations carried on by state corporations? Of course, no such extreme position is taken by our learned adversaries. The point really is, not that Congress cannot tax state corporations at all, but that the selection and classification of state corporations for taxation when indivduals or copartnerships are not similarily taxed, is arbitrary and as such is beyond the power of Congress, or in conflict with the Fifth Amendment.

The mere franchise or license to be a corporation or to carry on business in corporate form certainly does not of itself make a corporation a governmental instrumentality or agency. The great majority of corporations, like ordinary partnerships, are formed under general laws for purely private purposes. At the present day, the laws of the several states authorize the formation of corporations for any lawful business purpose as freely as they authorize or permit the formation of partnerships, by simply executing and filing a certificate or articles of incorporation. If a state were to enact a law permitting partnerships to be formed only in a prescribed man-

ner and upon payment of a license fee, no one would urge that this right constituted a special franchise or privilege which would exempt partnerships from federal taxation. The proposition that a state, by authorizing individuals or partnerships to form themselves into a corporation and carry on business in corporate form, can thereby exempt them from the power of Congress to impose an excise tax upon their business ought only to be plainly stated in order to refute itself. And probably no one would seriously so contend.

There are, of course, special franchises which may be conferred by a state upon corporations or individuals to enable them to perform certain governmental functions which would otherwise be performed by the state itself, as, for example, the franchise to use the public streets and highways or to condemn private lands for the construction, maintenance and operation of railroads, gas works, water works, etc. Those who exercise these special franchises may, perhaps, be deemed governmental instrumentalities of the state, and it may well be that they could not be singled out and directly taxed by Congress as a separate and distinct class; and, undoubtedly, public utilities, when owned by the state itself and not conducted by it as a private business for profit, ought not to be taxable by Congress. But, it is well established that such public utilities, when owned and operated by private corporations or by individuals for purposes of profit, are proper subjects of taxation, *Railroad Company* v. *Peniston*, 18 Wall. 5, 31, and that, if owned and operated by the state as a business for profit, they become

subject to taxation by Congress within the principle of the *South Carolina* case, *supra*, 199 U. S. 437.

In the case of the Coney Island and Brooklyn Railroad Company, No. 409, submitted with the case at bar, the defendant railroad company operates a railroad under a special franchise from the State of New York, but it is well settled in that state that such a special franchise is entirely distinct from the so-called franchise to be a corporation. *City of New York* v. *Bryan*, 196 N. Y. 158, 163; *People* v. *O'Brien, et al.* 111 N. Y. 1, 47. A federal tax on the franchise to condemn property and to operate the railroad in the State of New York might come within the ruling of the court in the case of *California* v. *Pacific Railroad Co.*, 127 U. S. 1, but that ruling certainly would not apply to a tax upon the business of the railroad corporation. This case did not overrule or qualify *Railroad Company* v. *Peniston*, 18 Wall. 5. A tax upon the mere carrying on of business, levied impartially and uniformly upon all corporations, is essentially different from a tax on so-called special franchises and from a tax on the franchise to be a corporation or to carry on business in corporate form.

The fact that the tax in question applies to all unincorporated joint stock companies and associations organized for profit, and having a capital stock represented by shares, indicates that Congress did not regard the tax as a corporate franchise tax. As is well known, there are many large joint stock associations in the United States that are not incorporated and that do not pay corporate franchise taxes. Thus, several of the large express companies are organized under the laws of a state, *e. g.*,

New York, just as partnerships are organized under the laws of a state; but they are not incorporated. Although such organizations possess some of the attributes of corporations and hence may be properly and fairly classified with them for purposes of taxation, as shown in *People ex rel. Platt* v. *Wemple*, 117 N. Y. 136, they are nevertheless not vested with corporate franchises and are not corporations.

Upon the prior hearing, it was suggested that an excise tax imposed by Congress generally upon *all* businesses and occupations would be unconstitutional, but that a tax upon selected or enumerated businesses or occupations would not be unconstitutional. Stated in other language, the contention seemed to be that Congress may constitutionally lay an excise tax upon any number, however large, of different businesses and occupations, provided that the several businesses or occupations are separately described, but that it cannot impose a tax in general terms upon all businesses and occupations, because such a tax would be a direct tax. The isolated expressions selected from decisions of this court do not support this proposition. There are numerous instances in which Congress has imposed excise taxes upon all businesses, trades and professions without enumerating them separately. Thus, in the act of August 6, 1861, c. 45, sec. 49, 12 Stat. 309, the tax was levied upon income derived "from any profession, trade, employment, or vocation, carried on in the United States or elsewhere"; and the same language was used in the act of June 30, 1864, c. 173, sec. 116, 13 Stat. 281; in the act of March 3, 1865, c. 78, sec. 1, 13 Stat. 479, and in the act of March 2, 1867, c. 169, sec. 13, 14

Stat. 478. In the act of July 14, 1870, c. 225, sec. 6, 16 Stat. 257, the language was "income derived from any business, trade, or profession carried on in the United States"; whilst in the act of August 27, 1894, c. 349, sec. 27, 28 Stat. 553, Congress reverted to the prior words, "any profession, trade, employment, or vocation." There is, of course, no ambiguity or uncertainty in the word "business," and the phrase "carrying on or doing business," and they are common forms of expression in tax laws.

There is, however, a serious question as to whether Congress may select state corporations as a separate class and impose upon them an excise tax "with respect to the carrying on or doing business by such corporation," while exempting or not similarly taxing individuals and copartnerships engaged in carrying on or doing identically the same business under substantially like conditions. The recent decision of this court, reported since the hearing at the last term, in *Southern Railway Co.* v. *Greene* 216 U. S. 400, would seem to indicate that no such classification would be reasonable or constitutional. Congress has no relation to or power over state corporations other than the relation it bears to or the power it may exercise over individuals or partnerships. If a state, aside from its power to create, regulate or exclude corporations, could not discriminate against corporations and in favor of individuals or partnerships without violating the Fourteenth Amendment, then any attempt by Congress so to discriminate may likewise be unconstitutional under the Fifth Amendment. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 410.

At any rate, this court has never held that corporations may be thus discriminated against as to the carrying on of business, and Congress has never before attempted to do so. As Mr. Justice Bradley said in the leading case of *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237: "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition." The classification of corporations as a separate class by the states has been sustained on grounds which are, at least partly, unavailable in support of an act of Congress. *The Delaware Railroad Tax*, 18 Wall. 206; *Bell's Gap R'd Co.* v. *Pennsylvania* 134 U. S. 232, 237; *Home Ins. Company* v. *New York*, 134 U. S. 594, 606; *New York State* v. *Roberts*, 171 U. S. 658, 665; *Florida Central &c. R'd Co.* v. *Reynolds*, 183 U. S. 471, 477; *Berea College* v. *Kentucky*, 211 U. S. 45, 54.

II.

Congress cannot constitutionally impose an excise tax measured by non-taxable income.

It is in substance and effect argued on behalf of the Government that if Congress has constitutional power to impose upon every corporation an occupation tax or "a special excise tax with respect to the carrying on or doing business," it may measure that tax by the entire net income of the corporation, including not only income derived from business, but also income derived directly from investments in property, such as interest on United States, state, and municipal

bonds, rents of real estate, and interest, dividends, etc., from personalty. This contention is based principally upon the argument that corporations and joint-stock corporations organized for profit are necessarily organized for business purposes, and, therefore, that all their property, of whatever kind or nature and however held or employed, must be deemed to be held for business purposes and used in carrying on or doing business. From these premises the conclusion is drawn that any tax upon the income of a corporation or joint-stock association is in its nature essentially and always an excise on business and an occupation tax.

To this argument it should be a sufficient answer to say that the premises upon which it is based are not true in fact or in law. Corporations and joint-stock companies and associations, though organized for profit and having a capital stock, may lawfully hold and in fact often do hold property not employed in their business, just as individuals do. The same is particularly true of insurance companies. It often happens that business corporations and associations set apart and invest certain assets which are not in any sense used in the business. Such a course certainly is not prohibited by law. Income from these investments is not in fact income derived from carrying on or doing business. Again, business corporations may acquire property in the expectation of using it in their business at some future time, or by gift or donation or subsidy, and the income received from the property so held before it is actually used for business purposes is income derived directly from the property, and not income from the carry-

ing on or doing business. Similarly, it is well settled that business corporations may acquire property not for use in their business, but for the purpose of obtaining upon economical terms the use of other property required for business purposes. For example, corporations like banks or insurance companies requiring permanent offices often purchase or erect office buildings, and rent to tenants so much of the building as is not used by the corporation in carrying on its own business. The greater part of such a building is frequently thus rented. The rents so received are not income derived from carrying on or doing the banking or insurance business.

An examination of the exact issues presented for decision in the Income Tax Cases of 1895 will show that those cases involved an income tax imposed on two trust companies, New York corporations, under section 32 of the act of August 27, 1894 (c. 349, 28 Stat. 509), which read as follows:

> "Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships."

It was this tax, as laid upon these two corporations, that was held to be partially a direct tax and, therefore, in violation of the Constitution because not apportioned. No individual was before the court. Of course, the conlusion followed, *a fortiori*, that the similar tax imposed by section 27 of the same act as part of one general scheme of taxation upon all citizens of the United States and upon all persons residing in the United States was likewise unconstitutional and void in so far as it included a tax on income derived from the rents of real estate and from personal property or municipal bonds. But it was not held or intimated that the act of 1894 was unconstitutional in so far as it applied to income derived from carrying on business. On the contrary, it was conceded by counsel and recognized by the court that a tax on income derived from business or occupation would not be a direct tax but would be an excise. As Mr. Chief Justice Fuller said, in delivering the opinion of the court on the rehearing in the *Pollock* case, 158 U. S. at p. 635:

> "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such."

It should be noted that section 27 of the act of 1894 (printed in the appendix) specifically included not only a direct tax on income "derived from any kind of property, rents, interest, dividends, or salaries," but also an excise tax "on gains, profits and income . . . derived . . .

from any profession, trade, employment, or vocation carried on in the United States or elsewhere." There can be no doubt that if the act of 1894 had merely imposed a tax on gains, profits and income derived by individuals from any profession, trade, employment, or vocation, and on net income derived by corporations from "the carrying on or doing business," the act would have been unanimously upheld as a valid excise tax within the ruling of the prior decisions of the court.

Nor can there be any doubt that the court then distinctly held that a tax on income derived by the *corporations* before the court—namely, The Farmers' Loan and Trust Company and The Continental Trust Company—from property, real or personal, and from municipal bonds was a direct tax. If, as now argued on behalf of the Government, a tax on the net income of corporations, etc., is essentially and invariably an excise, even though the income be derived partly or wholly from non taxable securities, or property taxable only by the rule of apportionment, then the decisions of 1895 were erroneous, and everybody at that time wholly overlooked the real point involved; for according to this argument the entire income of every business corporation must in every case be deemed income derived from carrying on business and the tax imposed by the act of 1894, therefore, was wholly an excise tax as to the corporations then before the court, and not, as held by the court, partly a direct tax and partly an excise. In other words, if the argument now advanced by counsel for the Government be sound, the court and all the counsel in the Income Tax Cases failed to perceive that the true rule was that any tax upon the

income of a business corporation, joint-stock association, unincorporated company, or, indeed, every partnership formed to carry on business, is in its essence an excise tax on business, whether or not the income be derived directly from non-taxable securities or other property not actually used in business.

We may test the proposition by applying the rule now urged by the Government to individuals, for the power of Congress to tax corporations is exactly the same as the power to tax individuals. Probably more than ninety-nine per cent. of the adult male residents of the United States are engaged in some taxable business, trade, profession, employment, or vocation. According to the argument of the Government, Congress in every case could impose an excise occupation tax measured by the wealth of the individual, including real estate and non-taxable bonds, or by the income derived therefrom. Thus, by the simple device of imposing a special excise tax "equal to" or "measured by" the property or income of the individual to be taxed, Congress could nullify the constitutional prohibition against direct taxes without apportionment and could impose taxes upon state, county and municipal bonds, and upon tax-exempt United States bonds held by any individual engaged in any taxable business, trade, profession, employment, or vocation!

It should be observed also that if the argument now advanced on behalf of the United States be sound, many of the decisions of the court sustaining excise taxes on corporations have proceeded on entirely erroneous reasoning. The recent case of the *Spreckels Sugar Refining Company* may be cited as an example (192 U. S. 397,

410, 417). In that case, the company was organized for the purpose of carrying on or doing "the business of manufacturing sugar," and had no other business. According to the present view of the Government, the company could not legally have owned property unconnected with its business, and all income must necessarily have been income from carrying on or doing business. Yet, the court held that income derived from property "wholly distinct from the business of refining sugar" was not taxed.

In *Galveston, Harrisburg &c. Ry. Co.* v. *State of Texas*, 210 U. S. 217, the court considered the constitutionality of a Texas statute imposing upon each railroad company within the State of Texas an annual tax "*equal to* one per cent. of its gross receipts." It was argued on behalf of the State of Texas that this tax was not a tax upon property or upon gross receipts but was an occupation tax upon a Texas railway company "equal to a given percentage calculated on the gross receipts," that is, of course, measured by such gross receipts. The railway company, however, contended that in so far as the tax was based on, or was measured by, receipts derived from interstate transportation, the tax was a burden on interstate commerce and therefore wholly invalid. In deciding that the tax was invalid, the court used the following language (at pp. 227 and 228):

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a

regulation in a relatively immediate way, it will not be saved by name or form. *Stockard* v. *Morgan*, 185 U. S. 27, 37; *Asbell* v. *Kansas*, 209, U. S. 251, 254, 256.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax "equal to" one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

In *Western Union Tel. Company* v. *Kansas*, 216 U. S. 1, the State of Kansas had passed a statute providing, among other things, that before any foreign corporation should have authority to do local business in Kansas it should pay to the State Treasurer a charter fee of one-tenth of one per cent. of its authorized capital stock. The Western Union Telegraph Company, a New York corporation engaged in interstate commerce and seeking to do local business in Kansas, refused to pay the required fee, claiming that the law was unconstitutional on the ground that the State of Kansas could not require a foreign corporation, as a condition of doing a local business in Kansas, to pay a tax based upon or measured by the total capital stock of the corporation representing all its business and property wheresoever

situated, because business transacted and property located beyond the state was not taxable. It was claimed on behalf of the state that, as the state could prevent foreign corporations from doing local business in Kansas on any terms, it could grant the privilege of doing local business upon such terms as the state might see fit to impose. The court, however, held that the act was unconstitutional. Mr. Justice Harlan, delivering the opinion of the court, used the following language:

> "The express words of the statute leave no doubt as to what is the *basis* on which the fee, specified in the State statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital, that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with the lines outside of that State. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the State has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and, in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent of its whole authorized capital, representing all of its property and all its business and interests everywhere." (pp. 30–31.)
>
> "The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the State as a fee or tax on the sale of an article imported only for sale or as a tax on the occupation of an importer would be a tax on the property imported, *Brown* v. *Maryland*, 12 Wheat. 419, 444; or that a tax on the stock

of the United States is a tax on the contract under which it was issued, and a tax on the power to borrow money on the credit of the United States, *Weston* v. *Charleston*, 2 Pet. 449, 467, 468; or that a tax on the salary of an officer of the United States would be a tax on the means employed by the government of the Union to execute its constitutional powers, *Dobbins* v. *Erie County*, 16 Pet. 435, 449; or that a tax on an ordinary bill of lading for property taken out of a State would be a tax on the property covered by that instrument, *Almy* v. *California*, 24 How. 169; or that a tax on the amount of sales made by an auctioneer would be a tax on the goods sold, *Cook* v. *Pennsylvania*, 97 U. S. 566, 573. But, as already said, what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the State has not chosen to ascertain and declare. It has seen proper to exact a specified per cent *of* the authorized capital of the Telegraph Company, representing, necessarily, all its business, interstate and intrastate, and all its property interests in and out of the State." (pp. 32–33.)

"We repeat that the statutory requirement that the Telegraph Company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance" (p. 37).

See also *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 416; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 519; *Louisville, &c. Ferry Co.* v. *Kentucky*, 188

U. S. 385, 396, 398; *State Tonnage Tax Cases*, 12 Wall. 204, 217.

It is submitted that the underlying principle of these decisions is that a license or occupation tax cannot be imposed by a state upon foreign corporations, measured by the amount of non-taxable property or the amount of non-taxable interstate business of the corporation, and that any such attempt would establish an unconstitutional basis of classification for purposes of taxation; in other words, that a tax cannot be measured by non-taxable property or income. If we apply the same principle to the case at bar, it must follow that Congress cannot directly or indirectly measure an excise tax on corporations or individuals by property or income which is not taxable at all or only taxable by a direct and apportioned tax.

III.

THE ACT OF AUGUST 5, 1909, SHOULD BE CONSTRUED AS IMPOSING AN EXCISE TAX ONLY UPON INCOME DERIVED FROM THE CARRYING ON OR DOING BUSINESS.

As this court has repeatedly pointed out, and notably in the recent decision in *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, if an act of Congress be reasonably susceptible of a construction that will avoid a conflict with the Constitution of the United States, such construction should be adopted. The opinion of the court in that series of important appeals laid down the controlling rule as follows:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably sus-

ceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such a ruling was unneccessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407."

Section 38 of the act of August 5, 1909, is susceptible of a construction which may render the act constitutional and avoid the grave and doubtful constitutional questions involved in the contention of the Government or suggested in the numerous briefs filed on behalf of the various appellants. According to this construction, as the act purports to impose "a special excise with respect to the carrying on or doing business," the tax is to be assessed upon net income received "from all sources" in carrying on or doing business, but is not to be assessed upon income derived directly from United States, state, county or municipal securities, or from real and personal property not used or employed in business. Thus construed, the act imposes an excise tax upon business or occupation and not in any respect a direct tax on property or on nontaxable securities, and thereby any conflict with express or implied constitutional limitations is avoided.

Congress has acted upon the decisions of this court in

the Income Tax Cases, and has proposed for adoption by the several states a Sixteenth Article of Amendment to the Constitution, to read as follows:

> "Article 16. The Congress shall have power to lay " and collect taxes on incomes, from whatever source " derived, without apportionment among the several " States and without regard to any census or enu- " meration."

There is, therefore, now pending before the people of the United States a proposal submitted by the same Congress that passed the act in question to amend the Constitution so as to permit Congress to tax without apportionment incomes derived from real and personal property. Congress has practically accepted the construction of this court that certain income taxes, *i. e.*, taxes on income derived directly from real or personal property, were direct taxes, and it has proposed that the Constitution be amended by providing that direct taxes on income need not be apportioned as all other direct taxes must be. The purpose of the amendment plainly and avowedly was to meet the decision of the court in the *Pollock* case. There was no need of an amendment to enable Congress to impose excise taxes on incomes derived from the carrying on of business by individuals, partnerships, or corporations, and no one seems to have disputed or to be now disputing the power to do so. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, and cases cited. The act of August 5, 1909, was passed within two weeks of the submission by Congress of this proposed amendment, and the action in both instances was *in pari materia*. Under these circumstances, it does not seem reasonable to assume that Congress intended by this act now before the court never-

theless to impose an income tax on the income of corporations which would be partly a direct tax within the decision in the Income Tax Cases, and thereby call upon the court to reconsider and overrule those cases.

If the phrase "from all sources" found in the act of 1909 be construed to relate to the preceding words evidencing the intention of Congress to impose "a special excise tax with respect to the carrying on or doing business," we shall then impute to Congress the *intention* not to violate any of the provisions of the Constitution as authoritatively interpreted by this court. Otherwise, it must be held that Congress intended, in defiance of the decision of this court in the Income Tax Cases, to impose a tax upon income derived from non-taxable securities and from real and personal property, and it must be held also that the action of Congress in proposing a Sixteenth Amendment to the Constitution was meaningless and unnecessary so far as corporations were concerned, or indeed so far as any persons or partnerships engaged in business were concerned.

To construe the present act of Congress as not applicable to income derived from rents or directly from real and personal property and municipal bonds would be in accordance with the well settled rule of statutory construction that a general provision must be deemed limited by special statutory or constitutional provisions or exemptions. Thus, the act of 1909 should be deemed limited by the constitutional requirement that a tax upon income derived directly from real or personal property must be apportioned among the states. Again, the act of 1909 should be construed as

subject to the implied constitutional limitation that bonds issued by the state governments are not taxable directly or indirectly by Congress. For the same reason, the act of 1909 should be construed as subject to the exception of the special statute providing that United States bonds shall not be taxed by Congress. This familiar rule of construction is illustrated by such cases as *Kepner* v. *United States*, 195 U. S. 100, 125, and *United States* v. *Nix*, 189 U. S. 199, 205.

The test in each case should be whether the income had been received as direct income from property or as income from carrying on business. Rents of real estate collected from others would not be taxed because this would be a direct tax, but income derived from the use of real property in carrying on a business would be taxable. Thus, a corporation owning real estate used in conducting its business, such as the plant of a manufacturing company, the hotel of a hotel company, the mines of a mining company, the right of way, terminals and yards of a railroad, the docks, quays and wharves of a wharf company, or any other real estate employed in business and not leased to others, would be taxable thereon or on income derived therefrom by an excise tax; but rents collected upon real property leased to others would not be taxable except by a direct tax. Similarly, an excise tax could be imposed upon the income derived by a corporation from profits in its business of buying and selling real property, but not upon rents collected upon real property owned by the corporation as an investment and not used in its business, but leased to others. A tax upon income received by a corporation as interest on bonds

owned by it or upon loans of moneys to others would be a direct tax, but a tax upon profits derived from carrying on the business of dealing in securities or loaning money on commission would be an excise tax.

The decision of the court in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 417, would seem to be conclusive upon this point. Mr. Justice Harlan there said:

> "But, clearly, neither interest paid to the plaintiff on its deposits in bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar. The moneys deposited by the plaintiff in bank were, we assume, on this record, the profits it had earned in the business in which it was engaged. Profits did not necessarily remain in the business; and whether they would be divided among stockholders or be used in the further prosecution of the business was for the plaintiff to determine. They could have been used for purposes wholly distinct from the business of refining sugar. We are of opinion that the receipts by the plaintiff of interest on its bank deposits had no necessary relation to the business of refining sugar, but rested wholly upon some agreement or understanding between the bank and the depositor, which had no direct connection with that business. And the same thing may be said of plaintiff's investment of its moneys in the stocks of other companies. In the absence of any showing to the contrary, it must be assumed that the declaration or the receipt of dividends on such stocks was wholly apart from the particular business in which the holder of the stock was engaged."

If, as seems to be urged by the Government, Congress clearly intended in and by the act of 1909 to impose a tax on all the net income of corporations, not only that derived from the subject matter of the tax, *i. e.*, *the car-*

rying on or doing business, but also that derived from real and personal property and municipal bonds, in the very teeth of the decision in the Income Tax Cases, which distinctly held that a tax on income derived by corporations from real and personal property and municipal bonds was a direct tax, surely such an extraordinary intention would have been declared in unmistakable terms. Congress would have said "income derived from business transacted and capital or surplus invested", and thus have plainly covered, if it had so intended, what was involved and decided in prior cases. The argument in support of the broad construction urged by the Government must necessarily be that the words "from all sources" do not relate to the antecedent subject matter of the tax, namely, "the carrying on or doing business," but mean something much broader, or, in other words, are equivalent to the words "from business transacted and capital and surplus invested."

It is the well-known story of the time, of which the court will undoubtedly take judicial notice, that the Sixteenth Amendment was proposed in connection with the passage of the Tariff Law of 1909. A number of senators and representatives were insisting upon inserting in that Tariff Law an income tax similar to the tax contained in the act of 1894, so as thereby to force a reconsideration of the ruling in the prior cases. It was in order to prevent any general income tax provision in the act of 1909 similar to the provision contained in the act of 1894, and in order to avoid the unseemly position of the Congress declining to accept the authoritative decision of this court, that a compromise was entered into under

which it was agreed to pass a joint resolution to amend the Constitution of the United States as suggested by this court in the opinion in the *Pollock* case (158 U. S. 635), so as to vest in Congress power to lay direct income taxes without apportionment. It would be strange, indeed, if in view of this indisputable history, it should now be held that after all it was the deliberate intention of Congress, in and by section 38 of the act of 1909, to enact a provision which, as to corporations, joint stock associations and insurance companies, should be identical in substance and effect with the income tax provision contained in the act of August 15, 1894, and thus plainly in conflict with the ruling in the Income Tax Cases of 1895.

It will be observed that the language used in the act of 1909 with respect to foreign corporations is significantly and distinctly different from the language used with respect to domestic corporations. Instead of measuring the tax by entire net income received from all sources, as in the case of domestic corporations, Congress provided that in the case of foreign corporations the tax should be upon the amount of net income received from "business transacted *and* capital invested within the United States and its Territories, Alaska and the District of Columbia." According to the contention of the Government, as all income of a corporation is derived from business, the words "and capital invested" were unnecessary and are meaningless. But if they were not unnecessary and meaningless, then surely it was because Congress recognized the difference between transacting business (that is,

the carrying on or doing business) on the one hand and the investment of capital on the other.

The separate provision taxing the income of foreign corporations derived from "capital invested within the United States" is clearly unconstitutional within the ruling in the *Pollock* case. On such capital invested in real or personal property, the tax is direct and not an excise. But, so far as we have been informed, no foreign corporation is now before the court challenging the constitutionality of the act because, as to it, the tax is partly an excise tax on business transacted and partly a direct tax on capital invested.

So also as to the taxation of corporations engaged in the export business or engaged in transacting business in foreign countries. Assuming that income derived from exporting or income derived from carrying on or doing business in foreign countries is not within the taxing power of Congress under the rules declared in such cases as *Railroad Co.* v. *Jackson*, 7 Wall. 262; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 181; *Louisville, &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299; *Delaware, L. &c. R.R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky* 199 U. S. 294; *Selliger* v. *Kentucky*, 213 U. S. 200; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; it may be ruled that it does not lie with those not so engaged to challenge the constitutionality of the act of Congress in so far as it affects other corporations not before the court.

The provision in the act of 1909 excluding income re-

ceived as dividends upon stock of other corporations, etc., does not imply that no other deductions were intended by Congress. The exclusion of income received as dividends on stock of other corporations was inserted in the act for the purpose of avoiding double taxation, in the case of holding companies whose whole *business* frequently is to acquire and hold stocks. Congress presumably deemed it unjust to compel a holding company to pay a tax upon income derived from dividends of other companies which had already paid the tax, although if a corporation has been organized for the purpose of carrying on the business of holding securities, there is, perhaps, no reason why it can not be subjected to taxation upon net income or profits derived from that occupation or business. *People ex rel. Vandervoort R. Co.* v. *Glynn*, 194 N. Y. 387, 389.

Under the laws of many of the states, which authorize the formation of corporations for any lawful business purpose, corporations may be organized for the purpose of holding or dealing in the bonds and stocks of other corporations and for the purpose of holding and dealing in real estate. Innumerable corporations have been organized for these purposes, as must be shown by the reports on file under the act of August 5, 1909. In New York, for example, such corporations may be organized under the Business Corporation Law, ch. 12, laws 1909, entitled "An act relating to Business Corporations, constituting Chapter Four of the Consolidated Laws." This statute authorizes the creation of "a stock corporation for any lawful business purpose or purposes," and under this provision many companies have been organized either to

hold stocks or to hold real estate. So, in New Jersey, the statute authorizes the formation of corporations for any lawful purpose, and, as is well known, it was under this New Jersey statute that the Northern Securities Company was organized in November, 1901, for the purpose of holding the securities of other corporations. *Northern Securities Company* v. *United States*, 193 U. S. 197.

Moreover, under recognized rules of construction, the exception or exclusion of dividends from stocks of other corporations does not signify that the general clause "from all sources" must be given any broader interpretation than if no such exception had been made. In *Baggaley* v. *Pittsburg & Lake Superior Iron Co.*, 90 Fed. Rep. 636, 628, Mr. Justice Lurton, speaking for the Circuit Court of Appeals, Sixth Circuit, among other things, said:

> "We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible. *Tinkham* v. *Tapscott*, 17 N. Y. 141."

See also *Mullins* v. *The Treasurer of the County of Surrey*, 5 Q. B. D. 170, 173, 174, and *The West Derby Union* v. *The Metropolitan L. Assurance Society*, [1897]

A. C. 647, 652, 655. The rule as to exceptions is analogous to the rule which obtains in the case of provisos. They are often interpreted so as not in any way to limit or extend the principal clause. *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *American Express Co.* v. *United States*, 212 U.S. 522, 534.

If the act of 1909 should be construed as applying only to income derived from the carrying on or doing business and as not applicable to income derived from non-taxable sources, the Treasury Department will find no difficulty in enforcing the provisions of section 38.

Under state laws imposing taxes upon the capital of corporations employed in business, or receipts derived from business, it is quite often necessary to make similar inquiry into the character and use of their property and the conduct of their businesses. *People ex rel. Singer Mfg. Co.* v. *Wemple*, 150 N. Y. 46; *Peo. ex rel. Chicago Junc. etc. Co.* v. *Roberts*, 154 N. Y. 1; *People ex rel. Hydraulic Co.* v. *Roberts*, 30 A. D. (N. Y.) 180, aff'd. 157 N. Y. 676; *People ex rel. Ft. George Realty Co.* v. *Miller*, 179 N. Y. 49; *People ex rel. Interb. R. T. Co.* v. *Williams*, 200 N. Y. 93, 103; *Commonwealth* v. *Standard Oil Co.*, 101 Pa. St. 119; *Coal & Mining Co.* v. *Ladd*, 160 Mo. 435; *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727; *In re Alabama & C. R. Co.*, 1 Fed. Cas. 271; *Gilchrist* v. *Helena, H. S. & S. R. Co.*, 47 Fed. Rep. 593; *Oakland Sugar Mill Co.* v. *Fred W. Wolf Co.*, 118 Fed. Rep. 239; *Construction Co.* v. *Winton*, 208 Pa. St. 467, 471, 472; approved in *Colonial Trust Co.* v. *Montello Brick Works*, 172 Fed. 310, 311;

General Conference of Free Baptists v. *Berkey*, 105 Pac. 411 (Cal.).

The various cases now before the court serve to show how the act of 1909 would operate if construed so as to eliminate income from non-taxable securities and income derived directly from sources which can be taxed only by a direct tax apportioned among the states.

No. 411, the case of the Northern Trust Company of Illinois, presents somewhat the same situation as the cases of Pollock and Hyde against the New York trust companies in 1895 (157 U. S. 429). The net income of the Northern Trust Company amounts to more than $205,000 per annum. Of this about $9,000 represents income and rents derived from real estate and $50,000 interest on municipal bonds (record in No. 753, fol. 3). Deducting these items, the net income subject to the tax is $146,000.

In No. 415, the Park Realty Company owns real estate in the city of New York, and on this property a hotel, known as the Hotel Leonori, has been erected, which has been leased at a fixed annual rental of $55,000 (record in No. 757, fol. 6). If the property were owned and leased by an individual or partnership a tax on these rents would be indisputably a direct tax. It is no less a direct tax because the property is owned by a corporation which leases the hotel to an individual, who carries on the business of keeping a hotel. If it had been leased to a corporation which carried on the hotel business, the corporation would have been liable to pay the present tax on the net income derived from that business.

In No. 431, the case of the Broadway Realty Company, a different situation is presented. It may be that that company is engaged in the business of managing an office building, and that its income is the product of that business, just as the income of a hotel-keeper from renting rooms would be the product of the business of keeping a hotel.

In No. 446, it does not appear for what purpose the Clark Iron Company was incorporated. The bill of complaint merely shows that it is a Minnesota corporation and entitled to own and hold real estate within that state (record in No. 800, fol. 3). However, it does appear that the company leases its ore lands to other parties, and that the lessees carry on the mining operations. The income of the company is derived from rents and royalties resulting from the mining operations or business conducted by its lessees. Probably, there is no difference between its ownership as lessor and the ownership of an individual or partnership, but the case may have to be decided on its particular facts, as the actual operations of the company may constitute the carrying on of a business, and thus be differentiated from the simple case presented in 415.

In No. 457, it appears that the Boston Wharf Company, a Massachusetts corporation, carries on the business of dockage and wharfage (record in 819, fol. 3), and presumably was organized for that purpose. It has real estate of the value of $5,000,000, and so far as appears all of it is employed in its business. The net income derived from dockage and wharfage will, of course, be income derived from the carrying on or doing business, even though the

plant be wholly real estate, just as the net income of a hotel, a manufacturing company, or a railroad may be all derived from the use and employment of real estate in carrying on or doing business. The position of an owner who leases real property to another at a rental, as in No. 415, is entirely different from that of an owner who himself uses his real estate in the conduct of his business.

IV.

Is the act of August 5, 1909, severable?

The question of severability is difficult of solution. If, as urged on behalf of the Government, it was clearly the intention of Congress to levy a tax measured not only by net income derived from the carrying on or doing business but also by net income derived from real and personal property and municipal bonds, then it must be evident that the act of 1909 is in substance and effect the same as the act of 1894, if not indeed even stronger in this respect. How can the courts divide one phrase and create a measure for the computation of the tax which the Government now insists would be different from the measure actually contemplated and prescribed by Congress? This difficulty shows how desirable it must be to accept as sound the view urged in this brief, namely, that Congress only intended to levy an excise tax on income derived from business sources and did not intend directly or indirectly to violate the rule declared in the *Pollock* case.

There can be no doubt that if it was the *intention* of Congress to impose a tax on corporations as broad and

comprehensive as the tax imposed in and by the act of 1894, then it must necessarily follow that the act of 1909 is not severable and cannot be enforced in so far as it imposes a legitimate excise tax on income derived from the carrying on or doing business. Such was the decision in the *Pollock* case in regard to the prior statute.

Since the *Pollock* case reviewing the authorities and holding that the act of 1894 was not severable (158 U. S. at p. 635), the following cases have also held statutes not to be severable: *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *United States* v. *Ju Toy*, 198 U. S. 253; *Illinois Central Railroad* v. *McKendree*, 203 U. S. 514; *Hatch* v. *Reardon*, 204 U. S. 152; *The Employers' Liability Cases*, 207 U. S. 463.

On the other hand, since the case last cited, the court has declared in the case of *El Paso & N. E. Ry.* v. *Gutierrez*, 215 U. S. 87, 96, that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." See also *New York Central R.R.* v. *United States*, 212 U. S. 481, 496; *Chicago, M. & St. P. Ry. Co.* v. *Westby*, 178 Fed. 619, 629.

Conclusion.

For the reasons discussed in the foregoing points, it is respectfully submitted that the true construction of section 38 of the act of Congress of August 5, 1909, is that it imposes an excise tax on income derived only from business sources and not on income derived from real or per-

sonal property or non-taxable securities. Such a construction would render the operation and effect of the act wholly constitutional in so far as it imposes an excise tax on the corporations organized in the United States, now before the court, unless, of course, it be held that Congress in imposing an occupation or business tax cannot discriminate against state corporations in favor of individuals or partnerships similarly engaged in business.

WASHINGTON, D. C., January, 1911.

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CORPORATION TAX CASES

UNDER ACT OF CONGRESS OF AUGUST 5, 1909.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 410.

Office Supreme Court U. S.
FILED
JAN 16 1911
JAMES H. McKENNEY,
Clerk.

FRANCIS L. HINE, APPELLANT

vs.

HOME LIFE INSURANCE COMPANY ET AL.

REHEARING.

APPENDIX TO BRIEF OF APPELLEES CONTAINING

1. TEXT OF ACT OF AUGUST 5, 1909, p. 1.
2. TEXT OF ACT OF AUGUST 15, 1894, p. 11.

ACT OF AUGUST 5, 1909, SEC. 38, C. 6, 36 STAT. 112.

Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: Provided, however, That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and pro-

viding for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United

States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: Provided, That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and

any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies. ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance

company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total

amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Terri-

tories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the at-

tendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any Court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made

and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence

taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

ACT OF AUGUST 15, 1894, SECS. 27 TO 37 INC. C. 349, 28 STAT. 509.

* By sections 27 to 37 inclusive of the act of Congress entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," received by the President August 15, 1894, and which, not having been returned by him to the House in which it originated within the time prescribed by the Constitution of the United States, became a law without approval (28 Stat. 509, c. 349), it was provided that from and after January 1, 1895, and until January 1, 1900, "there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States." . . . . . .

"Sec. 28. That in estimating the gains, profits, and income of any person there shall be included all income derived from interest upon notes, bonds, and other securities, except such bonds of the United States the

* Marginal note in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 434.

principal and interest of which are by the law of their issuance exempt from all Federal taxation; profits realized within the year from sales of real estate purchased within two years previous to the close of the year for which income is estimated; interest received or accrued upon all notes, bonds, mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectible, less the interest which has become due from said person or which has been paid by him during the year; the amount of all premium on bonds, notes, or coupons; the amount of sales of live stock, sugar, cotton, wool, butter, cheese, pork, beef, mutton, or other meats, hay, and grain, or other vegetable or other productions, being the growth or produce of the estate of such person, less the amount expended in the purchase or production of said stock or produce, and not including any part thereof consumed directly by the family; money and the value of all personal property acquired by gift or inheritance; all other gains, profits, and income derived from any source whatever except that portion of the salary, compensation, or pay received for services in the civil, military, naval, or other service of the United States, including Senators, Representatives, and Delegates in Congress, from which the tax has been deducted, and except that portion of any salary upon which the employer is required by law to withhold, and does withhold the tax and pays the same to the officer authorized to receive it. In computing incomes the necessary expenses actually incurred in carrying on any business, occupation, or profession shall be deducted and also all interest due or paid within the year by such person on existing indebtedness. And all national, State, county, school, and municipal taxes, not including those assessed against local benefits, paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such

person be owner, tenant, or mortgagor; also losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased within two years previous to the year for which income is estimated: *Provided*, That no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: *Provided further*, That only one deduction of four thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents, and one or more minor children, or husband and wife; that guardians shall be allowed to make a deduction in favor of each and every ward, except that in case where two or more wards are comprised in one family, and have joint property interests, the aggregate deduction in their favor shall not exceed four thousand dollars: *And provided further*, That in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of four thousand dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid, and shall include that portion of any income or salary upon which a tax has not been paid by the employer, where the employer is required by law to pay on the excess over four thousand dollars: *Provided also*, That in computing the income of any person, corporation, company, or association there shall not be included the amount received from any corpora-

tion, company, or association as dividends upon the stock of such corporation, company, or association if the tax of two per centum has been paid upon its net profits by said corporation, company, or association as required by this Act.

"Sec. 29. That it shall be the duty of all persons of lawful age having an income of more than three thousand five hundred dollars for the taxable year, computed on the basis herein prescribed, to make and render a list or return, on or before the day provided by law, in such form and manner as may be directed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to the collector or a deputy collector of the district in which they reside, of the amount of their income, gains, and profits, as aforesaid; and all guardians and trustees, executors, administrators, agents, receivers, and all persons or corporations acting in any fiduciary capacity, shall make and render a list or return, as aforesaid, to the collector or a deputy collector of the district in which such person or corporation acting in a fiduciary capacity resides or does business, of the amount of income, gains, and profits of any minor or persons for whom they act, but persons having less than three thousand five hundred dollars income are not required to make such reports; and the collector or deputy collector, shall require every list or return to be verified by the oath or affirmation of the party rendering it, and may increase the amount of any list or return if he has reason to believe that the same is understated; and in case any such person having a taxable income shall neglect or refuse to make and render such list and return, or shall render a wilfully false or fraudulent list or return, it shall be the duty of the collector or deputy collector, to make such list, according to the best information he can obtain, by the examination of such person, or any other evidence, and

to add fifty per centum as a penalty to the amount of the tax due on such list in all cases of wilful neglect or refusal to make and render a list or return; and in all cases of a wilfully false or fraudulent list or return having been rendered to add one hundred per centum as a penalty to the amount of tax ascertained to be due, the tax and the additions thereto as a penalty to be assessed and collected in the manner provided for in other cases as of willful neglect or refusal to render a list or return, or of rendering a false or fraudulent return." A proviso was added that any person or corporation might show that he or its ward had no taxable income, or that the same had been paid elsewhere, and the collector might exempt from the tax for that year. "Any person or company, corporation, or association, feeling aggrieved by the decision of the deputy collector, in such cases may appeal to the collector of the district, and his decision thereon, unless reversed by the Commissioner of Internal Revenue, shall be final. If dissatisfied with the decision of the collector such person or corporation, company, or association may submit the case, with all the papers, to the Commissioner of Internal Revenue for his decision, and may furnish the testimony of witnesses to prove any relevant facts having served notice to that effect upon the Commissioner of Internal Revenue, as herein prescribed." Provision was made for notice of time and place for taking testimony on both sides, and that no penalty should be assessed until after notice.

By section 30 the taxes on incomes were made payable on or before July 1 of each year, and five per cent. penalty levied on taxes unpaid, and interest.

By section 31, any non-resident might receive the benefit of the exemptions provided for, and "in computing income he shall include all income from every source, but unless he be a citizen of the United States

he shall only pay on that part of the income which is derived from any sources in the United States. In case such non-resident fails to file such statement, the collector of each district shall collect the tax on the income derived from property situated in his district, subject to income tax, making no allowance for exemptions, and all property belonging to such non-resident shall be liable to distraint for tax: *Provided*, That non-resident corporations shall be subject to the same laws as to tax as resident corporations, and the collection of the tax shall be made in the same manner as provided for collections of taxes against non-resident persons."

"Sec. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, savings institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships."

The tax is made payable "on or before the first day of July in each year; and if the President or other chief officer of any corporation, company, or association, or in the case of any foreign corporation, company, or association, the resident manager or agent shall neglect or refuse to file with the collector of the internal revenue district in which said corporation, company, or association shall be located or be engaged in business, a statement verified by his oath or affirmation, in such form as

shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, showing the amount of net profits or income received by said corporation, company, or association during the whole calendar year last preceding the date of filing said statement as hereinafter required, the corporation, company, or association making default shall forfeit as a penalty the sum of one thousand dollars and two per centum on the amount of taxes due, for each month until the same is paid, the payment of said penalty to be enforced as provided in other cases of neglect and refusal to make return of taxes under the internal-revenue laws.

"The net profits or income of all corporations, companies, or associations shall include the amounts paid to shareholders, or carried to the account of any fund, or used for construction, enlargement of plant, or any other expenditure or investment paid from the net annual profits made or acquired by said corporations, companies, or associations.

"That nothing herein contained shall apply to States, counties, or municipalities; nor to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary societies, orders, or associations operating upon the lodge system and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations and dependents of such members; nor to the stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes; nor to building and loan associations or companies which make loans only to their shareholders; nor to such savings banks, savings institutions or societies as shall, first, have no stockholders or members except depositors and no capital except deposits; secondly,

shall not receive deposits to an aggregate amount, in any one year, of more than one thousand dollars from the same depositor; thirdly, shall not allow an accumulation or total of deposits, by any one depositor, exceeding ten thousand dollars; fourthly, shall actually divide and distribute to its depositors, ratably to deposits, all the earnings over the necessary and proper expenses of such bank, institution, or society, except such as shall be applied to surplus; fifthly, shall not possess, in any form, a surplus fund exceeding ten per centum of its aggregate deposits; nor to such savings banks, savings institutions, or societies composed of members who do not participate in the profits thereof and which pay interest or dividends only to their depositors; nor to that part of the business of any savings bank, institution, or other similar association having a capital stock, that is conducted on the mutual plan solely for the benefit of its depositors on such plan, and which shall keep its accounts of its business conducted on such mutual plan separate and apart from its other accounts.

"Nor to any insurance company or association which conducts all its business solely upon the mutual plan, and only for the benefit of its policy holders or members, and having no capital stock and no stock or shareholders, and holding all its property in trust and in reserve for its policy holders or members; nor to that part of the business of any insurance company having a capital stock and stock and shareholders, which is conducted on the mutual plan, separate from its stock plan of insurance, and solely for the benefit of the policy holders and members insured on said mutual plan, and holding all the property belonging to and derived from said mutual part of its business in trust and reserve for the benefit of its policy holders and members insured on said mutual plan.

"That all state, county, municipal, and town taxes

paid by corporations, companies, or associations, shall be included in the operating and business expenses of such corporations, companies, or associations.

"Sec. 33. That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including Senators and Representatives and Delegates in Congress, when exceeding the rate of four thousand dollars per annum, a tax of two per centum on the excess above the said four thousand dollars; and it shall be the duty of all paymasters and all disbursing officers under the government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of two per centum; and the payroll, receipts, or account of officers or persons paying such tax as aforesaid shall be made to exhibit the fact of such payment. And it shall be the duty of the accounting officers of The Treasury Department, when auditing the accounts of any paymaster or disbursing officer, or any officer withholding his salary from moneys received by him, or when settling or adjusting the accounts of any such officer, to require evidence that the taxes mentioned in this section have been deducted and paid over to the Treasurer of the United States, or other officer authorized to receive the same. Every corporation which pays to any employé a salary or compensation exceeding four thousand dollars per annum shall report the same to the collector or deputy collector of his district and said employé shall pay thereon, subject to the exemptions herein provided for, the tax of two per centum on the excess of his salary over four thousand dollars: *Provided,* That salaries due to state,

county, or municipal officers shall be exempt from the income tax herein levied."

By section 34, sections thirty-one hundred and sixty-seven, thirty-one hundred and seventy-two, thirty-one hundred and seventy-three, and thirty-one hundred and seventy-six of the Revised Statutes of the United States as amended were amended so as to provide that it should be unlawful for the collector and other officers to make known, or to publish amount or source of income under penalty; that every collector should "from time to time cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects;" that the tax returns must be made on or before the first Monday in March; that the collectors may make returns when particulars are furnished; that notice be given to absentees to render returns; that collectors may summon persons to produce books and testify concerning returns; that collectors may enter other districts to examine persons and books; and may make returns; and that penalties may be imposed on false returns.

By section 35 it was provided that corporations doing business for profit should make returns on or before the first Monday of March of each year "of all the following matters for the whole calendar year last preceding the date of such return:

"First. The gross profits of such corporation, company, or association, from all kinds of business of every name and nature.

"Second. The expenses of such corporation, company, or association, exclusive of interest, annuities, and dividend.

"Third. The net profits of such corporation, company,

or association, without allowance for interest, annuities, or dividends.

"Fourth. The amount paid on account of interest, annuities, and dividends, stated separately.

"Fifth. The amount paid in salaries of four thousand dollars or less to each person employed.

"Sixth. The amount paid in salaries of more than four thousand dollars to each person employed and the name and address of each of such persons and the amount paid to each."

By section 36, that books of account should be kept by corporations as prescribed, and inspection thereof be granted under penalty.

By section 37 provision is made for receipts for taxes paid.

By a joint resolution of February 21, 1895, the time for making returns of income for the year 1894 was extended, and it was provided that "in computing incomes under said act the amounts necessarily paid for fire insurance premiums and for ordinary repairs shall be deducted;" and that "in computing incomes under said act the amounts received as dividends upon the stock of any corporation, company, or association shall not be included in case such dividends are also liable to the tax of two per centum upon the net profits of said corporation, company, or association although such tax may not have been actually paid by said corporation, company, or association at the time of making returns by the person, corporation, or association receiving such dividends and returns or reports of the names and salaries of employés shall not be required from employers unless called for by the collector in order to verify the returns of employés."

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[illegible]

No. [illegible]-411

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FRED W. SMITH, APPELLANT,

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. FULLER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JANUARY 20, 1912.

(21,979)



(21,979)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 753.

FRED W. SMITH, APPELLANT,

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT WILLIAM A. FULLER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 31, 1910.

1 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

29855.

FRED W. SMITH
vs.
THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

Messrs. Peckham, Brown, Packard & Walsh, Solicitors for Complainant.
Mr. Edward Osgood Brown, of Counsel.
Messrs. Judah, Willard, Wolf & Reichmann, Solicitors for Defendants.
Mr. Noble B. Judah, of Counsel.

2 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Monday, the twenty-fourth day of January, in the year of our Lord one thousand nine hundred and ten, being one of the days of the regular December Term of said Court, begun Monday, the twentieth day of December, 1909, and of our Independence the one hundred and thirty-fourth year.

H. S. STODDARD, *Clerk.*

3 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

29855.

FRED W. SMITH
vs.
THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

Be it remembered, That on this day to-wit: the fifteenth day of January, 1910, come the complainant in the above entitled cause by his solicitors, and filed in the Clerk's office of said Court a certain Bill of Complaint in the words and figures following to-wit:

4 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. In Equity.

FRED W. SMITH

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

Bill of Complaint.

Peckham, Brown, Packard & Walsh, Solicitors for Complainant.
Edward Osgood Brown, of Counsel.

5 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. In Equity.

FRED W. SMITH

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Northern District of Illinois, Sitting in Equity:

Fred W. Smith, who is a citizen of the State of Illinois, and a resident of the City of Chicago in the said state and in the Northern District of Illinois aforesaid, brings this his bill of complaint in behalf of himself and all other stockholders of The Northern Trust Company hereinafter named and described, who are similarly
6 situated and who shall be entitled to avail themselves of the benefit of this suit, against The Northern Trust Company, which is a corporation created and existing under and by virtue of the laws of the State of Illinois, located and having its principal office for the transaction of business in the City of Chicago, in the Eastern Division of the Northern District of Illinois, and A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith, who are all citizens of the State of Illinois and residents of said Eastern Division of the Northern District of said state, and who are, as hereinafter set forth, directors of the said corporation, The Northern Trust Company.

And thereupon your orator complains and represents unto your Honors as follows:

First. Your orator shows that the defendant, The Northern Trust Company, is a corporation duly organized and existing under and by

virtue of the provisions of an act of the General Assembly of the State of Illinois, entitled "An Act Concerning Corporations with Banking Powers," approved June 16, 1887, and the amendments thereof, approved June 3, 1889, and June 4, 1897, and June 3, 1907.

Reference is prayed to each and all of said acts for the powers and duties of the said defendant Trust Company and of its directors.

The capital stock of said corporation consists of the sum of one million five hundred thousand dollars, divided into fifteen
7 thousand shares of the par value of one hundred dollars each, and as your orator is informed and verily believes, the capital stock, surplus and accumulated profits of said Corporation now exceed the sum of three million five hundred thousand dollars.

Second. Your orator further shows unto your Honors that the said defendant Trust Company was and is authorized by the laws of Illinois, to do a general banking business, except the issuing of bills to circulate as money; to receive deposits and loan money, on personal and real estate security; to take, accept and execute all such trusts of every description as may be committed to said Company by any person or corporation by grant, assignment, devise or bequest or otherwise. By an act of the General Assembly of the State of Illinois, entitled "An Act to Provide for and Regulate the Administration of Trusts by Trust Companies," approved June 15, 1887, as amended by an act approved June 1, 1889, it may be appointed by any court of competent jurisdiction in the State of Illinois, trustee, receiver, assignee, guardian, conservator, executor or administrator Any court in the said state having jurisdiction of any receiver, executor, administrator, conservator, guardian, assignee or other trustee, may order such officer or trustee to deposit any money then in his hands or that may thereafter come to his hands, with said defendant corporation, The Northern Trust Company, and such deposits shall thereafter be paid out only on the orders of said court, but
8 said officer or trustee shall be discharged from further care or responsibility for said funds. Also by said act, whenever in the judgment of any court having jurisdiction of any estate in process of administration by an assignee, receiver, executor, administrator, guardian, conservator or other trustee, the bond required by law of such officer shall seem burdensome or excessive, upon application of such officer or trustee, and after a hearing on said application, the said court may order the said officer or trustee to deposit with the said defendant corporation, The Northern Trust Company, for safekeeping, such portion of all of the personal assets of said estate as it shall deem proper, and thereupon said court shall, by an order of record, reduce the bond theretofore given by such officer or trustee, and the property so deposited shall thereupon be held by said corporation under the orders and directions of said court. Said corporation is not required to give any bond or security in case of any appointment thus provided for by law, but before accepting any appointment or deposit, was obliged by the statutes of the State of Illinois to deposit with Auditor of Public Accounts of the State of Illinois, for the benefit of its creditors, the sum of $200,000 in stocks of the United States or municipal bonds of the State of Illinois or in

mortgages on improved and productive real estate in Illinois, and to procure from said Auditor of Public Accounts a certificate that said deposit had been made; said corporation is also required by law to file with the Auditor of Public Accounts of the State of Illinois, during the month of January of each year, a statement under
9 oath of the condition of said corporation on the thirty-first day of December next preceding. The law requires that the said report shall exhibit the following items in the following form:

(*a*) The assets of said Company, specifying:

First. The description and market value or as nearly as may be of the real estate owned by such Company.

Second. The amount of cash on hand and deposited in banks to the credit of said Company, specifying in what banks such deposits are.

Third. The amount of cash in the hands of agents and in course of transmission.

Fourth. The amount of loans secured by mortgages and bonds constituting a first lien on real estate, on which there shall be less than one year's interest due or owing and the amount of such interest.

Fifth. The amount of such loans on which there shall be more than one year's interest due or owing and the amount of such interest.

Sixth. The amount due the Company on which judgments have been obtained.

Seventh. The amounts of stocks and bonds of the State of Illinois and of the United States, of any incorporated city of the state and of any other stocks and bonds owned by said Company, specifying the amount, number of shares and the par and market value of each kind of stock or bonds.

Eighth. The amount loaned upon the pledges or securities with a statement of the securities so held by said Company and the par and market value of said securities.

Ninth. The amount of all other assets of said Company included accrued interest not enumerated above.

10 (*b*) The liabilities of said Company, specifying—

First. The capital stock of said Company.

Second. The surplus on hand.

Third. The undivided profits.

Fourth. The deposits held by said Company.

(*c*) A list and description of the trusts held by said Company, the source of the appointment thereto, and the amount of real and personal estate held by said Company by virtue thereof, except mere trusts. The said report must also be in such form and contain such statements, returns and information as to the affairs, business condition and resources of the corporation as the auditor of public accounts may in each year prescribe or require.

Your orator shows that the said defendant corporation has complied with all the requirements of the law of Illinois in the matters above mentioned (including a deposit with the Auditor of the State of Illinois of the sum of $200,000 in securities) and that as a matter

of law it was made by the effect of said statutes and its compliance therewith in an especial and peculiar sense an instrumentality and a part of the governmental machinery of the State of Illinois, and your orator shows that as a matter of fact it has under its charter authority and the provisions of the legislation above named been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases and in its trust capacity under such appointments now holds and is administering real and personal property of the aggregate value of many millions of dollars.

11 Third. And your orator shows that said Northern Trust Company owns and holds in its own right real estate located in the City of Chicago, Illinois, of the value of more than one million dollars, the larger part of which it uses for its banking offices and part of which is leased out to a tenant for the annual rental of nine thousand dollars; that said defendant Trust Company owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations, of the value of not less than one million four hundred thousand dollars, and that all of the cities, counties, parks and municipalities whose bonds are so held by said Trust Company, are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states.

Fourth. Your orator shows that the net income of the defendant Trust Company received by it from all sources during the year ending December 31, 1909 (exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the corporation tax so-called, alleged as hereinafter set forth to be authorized and provided for in Section 38 of the Act of Congress entitled "An Act to provide revenue, equalize duties and encourage industries of the United States and for other purposes," approved August 5, 1909), amounted to the best of your orators' knowledge, informa-

12 tion and belief to much more than two hundred and fifty thousand dollars.

Said net income is the amount remaining after deducting from the gross amount of the income of said defendant Trust Company, all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property; interest actually paid within the year on its bonded or other indebtedness; all interest actually paid by it within the year on deposits; all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or by the government of any foreign country as a condition to carrying on business therein, and all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject or purporting to be subject to the so-called "Corporation Tax" above described.

And your orator shows that for many years the net income of The Northern Trust Company computed as above set forth has been more than $205,000 annually and that as your orator is advised and believes it will continue so to be in the future for successive calendar years, beginning with the year 1910.

13 Fifth. Your orator shows that the real estate above set forth in Paragraph Three of this bill belonging to the defendant Trust Company consists of ground and building situated in the State of Illinois; that said Trust Company derives therefrom income and rents of about $9,000 per annum, and that said defendant Trust Company derives an income of more than $50,000 annually from its investments in interest bearing bonds of cities, counties, public parks and other municipal corporations, and that it receives a considerable and valuable income from its frequent appointment by the courts of Illinois as trustee, receiver, assignee, guardian, conservator, executor or administrator, and from the orders of courts of competent jurisdiction in Illinois by which receivers, executors, administrators, conservators, guardians, assignee and other trustees are required or are authorized voluntarily to deposit the moneys in their hands as such officers or trustees with the said defendant corporation.

Sixth. Your orator further shows on information and belief that under and by virtue of the powers conferred upon said defendant Trust Company, it has from time to time taken, accepted and executed and during the year 1909 has held and been executing and still holds and is executing numerous trusts committed to said Trust Company, by numerous persons, copartnerships, unincorporated associations, by grant assignment, devise and bequest and by orders of various courts, and that said Trust Company now holds as

14 trustees for many minors, individuals, copartnerships, associations and corporations resident in the United States and elsewhere many parcels of real estate exceeding 1,000 in number.

Seventh. Your orator further shows that the affairs, business and property of the said defendant Company are managed and conducted by nine directors and that the defendants A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith are citizens of the State of Illinois, and residents of the Eastern Division of the Northern District of said state, and that said defendants are the directors of the said defendant Trust Company, duly elected as such, and that they are now acting in that capacity and managing and conducting all and singular the affairs and business of said defendant Trust Company.

Eighth. Your orator further shows that he is a citizen of the State of Illinois and a resident of the City of Chicago in the said state and in the Northern District of Illinois aforesaid; that he became the owner and registered holder of 140 shares of the capital stock of the par value of $14,000 in said defendant Trust Company, before the 15th day of February, A. D. 1906, and that he has ever since been and still is a stockholder therein, owning and hold-

15 ing in his own right said 140 shares of its capital stock, the value of which 140 shares exceeds the sum of $40,000. The

capital stock of said Trust Company is divided among a large number of different persons, who, as such stockholders constitute a large body, and this suit is for an object common to them all. Your orator therefore brings this suit in his own name and in his own behalf as a stockholder in said Trust Company, and also as a representative and on behalf of such of the other stockholders similarly situated and interested as may choose to intervene and become parties hereto.

Ninth. Your orator further shows that as he is informed and verily believes, the defendant Trust Company and a majority of its directors who are managing and conducting its property, business, and affairs as aforesaid have determined and resolved that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," approved August 5, 1909, the said defendant Trust Company is liable to pay and that they intend to pay for it to the Federal Government on or before the thirtieth day of June, 1910, a tax equal to one per centum upon the entire net income of the said defendant Trust Company over and above five thousand dollars received by it from all sources during the calendar year ending December 31, 1909, exclusive of amounts received by it as dividends upon the stock of other corporations, joint
16 stock companies or associations or insurance companies, subject to the same alleged tax, including the income derived from the real estate which it holds as above set forth and from the public bonds, national, state and municipal, of which it is the owner, and including the income which it derives by virtue of its appointment by the courts of the State of Illinois as trustee, receiver, assignee, guardian, executor or administrator and by virtue of orders of such courts requiring such officers or other trustees, or allowing them voluntarily to deposit the moneys in their hands as such officers or trustees with the said defendant corporation.

Tenth. Your orator further shows that as he is informed and verily believes, in alleged compliance with the requirements of the Act of Congress aforesaid, the defendant Trust Company and its said directors have avowed their intention and propose voluntarily, to make and file with the collector of internal revenue for the First District of Illinois prior to the first day of March, 1910, a statement or return under oath of its president, vice-president or other principal officer and of its treasurer or assistant treasurer, setting forth—

(*a*) The total amount of its paid up capital stock outstanding on December 31, 1909.

(*b*) The total amount of its bonded or other indebtedness on said date.

(*c*) The gross amount of its income received during the year 1909, from all sources, and the amount received by it within the year by way of dividends upon stock of other corporations,
17 joint stock companies or associations or insurance companies, purporting to be subject to the alleged "Corporation Tax" as above described.

(*d*) The total amount of all the ordinary and necessary expenses

actually paid out of earnings in the maintenance and operation of its business and properties within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition of its continued use or possession of any of its property.

(*e*) The total amount of all its losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property.

(*f*) The amount of interest actually paid by it within the year on its bonded or other indebtedness, stating separately all interest paid by it within the year on deposits.

(*g*) The amount paid by it within the year for taxes imposed under the authority of the United States or any state or territory thereof; and

(*h*) The amount of its net income after making the deductions which the said Act of Congress heretofore described prescribes shall be made from its gross income to ascertain its net income, said deductions being the amounts of the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business, all losses sustained during the year and not compensated by insurance or otherwise, including an allowance for the depreciation of property; interest paid within the year on its bonded or other indebtedness, and the interest actually paid by it within the year on deposits; all sums paid for taxes during the year, and all amounts received within the year as dividends upon stocks of other corporations, joint stock companies or associations or insurance companies subject to the alleged tax.

18 Eleventh. Your orator further shows that he is informed and verily believes that the defendant, the Northern Trust Company, and a majority of its directors who are managing and conducting its affairs as aforesaid, also have taken the position that for each successive year after 1909, the said Trust Company will be liable to pay and that they intend voluntarily to pay for it to the United States on or before the Thirtieth day of June in each successive year a tax equal to one per centum upon the entire net income of the said defendant Trust Company over and above five thousand dollars computed and calculated as in the Tenth Paragraph of this bill set forth and that the said defendant, The Northern Trust Company, and its said directors, will, as your orator is advised, unless restrained by the order of this court as hereinafter prayed, voluntarily make and file with the Collector of Internal Revenue for the First District of Illinois, prior to the first day of March in each successive year after 1910, a statement or return for the year ending on the preceding 31st of December, showing the same matter and items as in said Tenth Paragraph of this bill it is alleged that they intend to make and file with said Collector for the year ending December 31, 1909.

Twelfth. Your orator avers that the provisions of said Act of Congress of August 5, 1909, as above set forth, which are found in the thirty-eighth section thereof, and which purport to render

liable the defendant corporation and all other corporations,
19 joint stock companies or associations organized for profit and having a capital stock represented by shares and every insurance company now or hereafter organized under the laws of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia (with the exception of certain organizations, associations and corporations which do not include the defendant corporation or any corporation of its nature and class), to pay annually a tax of one per centum upon the entire net income over and above five thousand dollars received by it from all sources during each year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the same tax, or if organized under the laws of any foreign country upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories, Alaska and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject to the same tax (the said tax being denominated in said Section 38 of the Act of Congress aforesaid as "a special excise tax with respect to the carrying on or doing business" by corporations, joint stock companies or associations and
20 insurance companies—"equivalent to one per centum upon the entire net income over and above five thousand dollars," etc.), are unconstitutional, null and void, and furnish no justification to the defendant corporation or its directors for the payment of said tax or for the returns to the collector of internal revenue, purporting to be required by said Section 38, which payment and returns the defendant corporation and its directors nevertheless are threatening and purposing to make, claiming that they are required so to do by said provisions of the said Act of Congress.

Thirteenth. Your orator (without conceding that the said provisions of the Act of Congress of August 5, 1909, purporting to levy a tax on corporations as above described, which tax will be for convenience hereafter in this bill designated merely as the Corporation Tax, are otherwise constitutional or valid, but protesting that in other respects than in those particularly enumerated in this bill he is advised and believes them to be unconstitutional, invalid and therefore null and void as applied to the defendant corporation) avers that the provisions of said Corporation Tax incorporated in the said Act of Congress are in conflict with the provisions of the Constitution of the United States and are null and void in the particulars and for the reasons set forth in the paragraphs from the Fourteenth to the Twenty-first, inclusive, of this bill.

21 Fourteenth. Your orator avers that the said Corporation Tax is a direct tax in respect of the real estate held and owned by the defendant Trust Company, and in respect of its per-

sonal property, and that said direct tax is not in and by said act apportioned among the several states, according to their population, as required by Section 2 of Article I of the Constitution of the United States, and by paragraph four of Section nine of Article I of the Constitution.

Fifteenth. Your orator also avers that if the said Corporation Tax so incorporated in said Act of Congress be held not to be a direct tax, but as denominated in the act (fallaciously, as your orator is advised and believes), "a special excise tax," or falls under any denomination of duties, imposts or excises, or is any other than a direct tax, then its provisions are nevertheless unconstitutional, null and void, in that they are not uniform throughout the United States, as is specifically and explicitly required in and by Section eight of Article I of the Constitution of the United States, as to all "duties, imposts and excises," and as is implicitly required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax,

A. Your orator avers that the said Corporation Tax is not uniform as to property, class or subject in that it is imposed on cor-
22 porations like the defendant corporation, created and organized entirely under the laws of the various states and made by those laws, persons resident in said states having all the rights of natural persons and of citizenship in said states and subject to no visitatorial or other powers of the Federal Government or of the Congress of the United States—in respect to which they are legally in precisely the same relation as are natural persons—but is not imposed on other individuals or persons in said states or on copartnerships or associations not having a capital stock represented by shares, who are carrying and transacting the same or similar business under like conditions and in the same localities, and having like property and net income.

B. The said Corporation Tax is not uniform even among corporations in that in every state and in almost all localities where the tax would be operative, and notably so in the State of Illinois and City of Chicago, where the defendant corporation is situated, there are a great number of corporations also organized under state laws entirely, the net income of which, computed as the Corporation Tax Law directs, amounts to less than $5,000 a year, and did not amount to such sum during the year 1909, and that said corporations are equally with natural persons and copartnerships exempted from said Corporation Tax, although it is imposed on other corporations doing similar business under like conditions and having an entire net income greater than $5,000.

C. The said Corporation Tax is not uniform even among corporations, in that in almost every state and in almost all localities where the tax would be operative, there are a large number of corporations also organized under state laws, which derive their income entirely from dividends upon stock of other corporations, joint stock companies, associations and insurance companies, subject to
23 the said corporation tax, and whose entire income was so derived during the year 1909 and that said corporations by the

effect of the law are equally with natural persons and co-partnerships exempted from said Corporation Tax.

D. The said Corporation Tax is not uniform even among corporations, in that in almost every state and in almost all localities where the tax would be operative there are a large number of corporations, also organized under state laws, which derive part of their income from dividends upon stock of other corporations, joint stock companies, associations and insurance companies, subject to the said corporation tax and part of whose income was so derived during the year 1909 and that the tax upon such corporation is calculated at a different rate from the tax imposed upon other corporations doing similar business under like conditions and having no part of their income derived from dividends upon stock of other corporations, joint stock companies, associations and insurance companies, subject to the said Corporation Tax.

E. Your orator avers that the said Corporation Tax is not uniform in that its effect would be to lessen the income from dividends of the shareholders of such corporations as are subject thereto, and thus operate as a federal income tax on such persons, many of whom have no other income, while all other persons resident in the United States are exempted from any federal tax on incomes. Thus an Income Tax is imposed on a very small proportion of the population of the United States, from which all other persons are exempted.

F. The said Corporation Tax is not uniform in its effect on corporations alone even, because of the exemptions therein contained of all labor, agricultural or horticultural organizations, all fraternal beneficiary societies, orders or associations operating under
24 the lodge system, domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, and all corporations and associations organized and operated exclusively for religious, charitable or educational purposes, no part of the net income of which enures to the benefit of any private stockholder or individual, and your orator shows that the said exemptions and classifications are arbitrary and unreasonable and based on no classification which is uniform or equitable, and that many other corporations which by the terms of the Corporation Tax Law would be subject to the Corporation Tax are equally with those that are thus exempted, organized and operated as fully for the mutual benefit of their members as those which are thus exempted.

G. Your orator further shows that if the Corporation Tax were held to be an excise tax and a tax or license fee upon the privilege of doing business as a corporation and thus exercising a corporate franchise, it would not be uniform throughout the United States because the incidents, privileges, immunities, obligations and liabilities pertaining to a corporate franchise or its exercise are not the same in all the states, but vary widely between different states and even between different classes of corporations in the same state. Thus the shareholders of all banking corporations created by the State of Illinois and organized under the Statutes of Illinois, are by the constitution and laws of the State of Illinois, individually responsible and liable to its creditors over and above the amount of stock held by

them respectively, to an amount equal to their respective shares so held for all liabilities accruing while they are such shareholders.

And your orator says that by the National Banking Law, the shareholders of all national banks are individually responsible
25 equally and ratably, but not for another, for all contracts, debts and engagements of the Bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount of their shareholdings.

But your orator shows that no such individual liability of shareholders exists in Illinois, in the case of corporations not doing a banking business, and that there is no personal liability on the shareholders of such other corporations, to the creditors of said corporations beyond the amount of their investments in the capital stock.

And on information and belief your orator avers that in some of the states of the United States there is no personal liability beyond the amount of their shareholdings imposed by law on the shareholders of banking corporations created and organized under the laws of said states, and in others there is unlimited personal liability imposed on such shareholders.

Your orator therefore avers that as the privilege of doing business as a corporation—a corporate franchise—is a different thing in one state from that which it is in another, and varies according to the legal requirements and enactments of the respective states which create the corporation and is a different thing as to a corporation like the defendant, created by the Federal Government under the National Banking Act from that which it is as to a corporation organized under state laws, and may be a different thing as to different corporations in the same state—a tax on the mere privilege of existing as a corporation and exercising a corporate franchise, is neither uniform as to the different states of the United States nor as to the corporations within each state.

II. And your orator further shows that in many other respects besides those specifically mentioned in this bill of complaint the said Corporation Tax is not uniform as required by Section 8 of Article I of the Constitution of the United States.

26 Sixteenth. Your orator further shows that if said Corporation Tax were held not to be a direct tax, nor a tax on property or income, but to fall under some other denomination, and if it were also held to be uniform throughout the United States within the meaning and intent of the Constitution of the United States, it must still be held to be unconstitutional and void, as not within the power of Congress to enact, and as interfering with the reserved rights and sovereignty of the several states, by which several states, corporations such as the defendant Trust Company were created, and in conflict particularly with the Tenth Article of the Amendments to the Constitution of the United States which reserves to the states the power to grant acts of incorporation as an incident of their sovereignty.

Your orator shows that although called by Congress a special excise tax, the Corporation Tax is not an excise tax. An excise tax,

as your orator is advised and believes, is an occupation tax upon the privilege or license to follow a particular occupation or do a particular kind or kinds of business, and not as is the Corporation Tax a tax upon the privilege of existing as a corporation and exercising a corporate franchise.

But your orator further shows that whether or not the Corporation Tax can be properly regarded as an excise tax, it is a tax either upon the privilege of existing as a corporation, or upon the privilege of doing business in a corporate capacity, and is in conflict with the Constitution of the United States because the supposed
27 power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the States to grant franchises of corporate capacity and the value and purpose of the franchises and privileges which the States have full power to grant.

Your orator further shows that included in the class of corporations on which the Corporation Tax is imposed are a very great number of public service corporations in the various states which perform public or semi-public functions in the matter of supplying intra-state and intra-municipal transportation, and in supplying water and light and other municipal necessities to municipalities in said states. These public service corporations have been in a great number of cases given the power of eminent domain by the state for the purpose of enabling them to carry out their public or semi-public functions, and they have thus been respectively made the direct instrumentalities and agents of the state creating them with which Congress has no power to interfere. And your orator represents that the inclusion of these corporations in the operation of the Corporation Tax Law would by itself render the same unconstitutional and void.

But your orator further shows that in a wider sense all corporate franchises and all rights granted by a State to exist as corporate entities are instrumentalities of that State in the exercise of its reserve powers and functions and cannot be constitutionally taxed or interfered with by the Congress of the United States.

28 Seventeenth. Your orator further shows that the defendant corporation, the Northern Trust Company, is as before set forth, a creation of the State of Illinois, that by the State of Illinois there has been given to it the authority to perform the various public functions set forth in the second paragraph of this bill, and that it has performed and is performing in many cases the duties imposed on it by the courts of the State of Illinois by their appointment of it, Trustee, Receiver, Assignee, Guardian, Conservator, Executor or Administrator in various respective cases, and that its net income on which the Corporation Tax purports to be imposed or by which it purports to be measured, which your orator charges to be the same thing, is partly derived from legitimate compensation allowed to it by the court for the discharge of the functions and duties thus imposed upon it. And your orator thus shows that in a peculiar and especial sense the Corporation Tax is in its case an attempted uncon-

stitutional interference with an instrumentality of the state of Illinois in the discharge of its functions and powers.

Eighteenth. Your orator further shows that though denominated in the act an excise tax the Corporation Tax is in reality as he is advised a tax on the incomes of corporations and that as it is an income tax, its provisions are unconstitutional, null and void, in that they impose a tax upon the incomes of many corporations, including the defendant Trust Company, derived partly from the bonds of the United States and from the bonds of various
29 States of the United States and from municipal bonds of counties and municipalities in said various states, which bonds are among the means and instrumentalities employed for carrying on the governments which issue them, and are not proper subjects of the taxing power of Congress. Said several states, and the counties and municipalities therein, are independent of the general government of the United States and the respective bonds of the said states and of their governmental agencies, the counties and municipalities therein, are, together with the power of the states to borrow in any form, exempt from federal taxation.

Your orator further shows that as he is informed and believes the bonds of the states, counties and municipalities of the United States which are exempted from federal taxation under the Constitution of the United States amount in the aggregate to a vast sum of which a very large proportion are held by corporations on which the Corporation Tax purports to be imposed, and that the income and interest from said bonds constitute a considerable proportion of the net income of many of such corporations and that it was and is the intention of Congress and is essential and necessary to accomplish the purposes and general scope of the Corporation Tax to lay and collect such tax on the said income derived by corporations from such state, county and municipal bonds, and that such would be the effect of the said Corporation Tax if it were valid.

30 Nineteenth. Your orator further avers that the provisions of said Corporation Tax, incorporated in the Act of Congress as aforesaid, are unconstitutional, null and void in that they impair property rights vested prior to the passage of said act and in that they purport to impose a tax on the net income of corporations, which income accrued prior to August 5, 1909, the date on which said act became a law, or else purport to impose a tax on the privilege of doing business as a corporation prior to said August 5, 1909.

Twentieth. Your orator further avers that the provisions of the Corporation Tax incorporated in the Act of Congress as aforesaid are unconstitutional, null and void in that all corporations thereby taxed may under and by virtue of its terms and provisions be deprived of their property without due process of law in violation of Article V. of the Amendments to the Constitution of the United States.

Twenty-first. Your orator further shows that the provisions of said Corporation Tax incorporated in said Act of Congress as aforesaid are unconstitutional, null and void in that all corporations thereby taxed may be compelled to disclose their private books and

papers, in order to make them liable for a penalty or to forfeit their property, and in any event are obliged to make returns of
31 their private business in such manner that they become public records open to competing and hostile examination although the said corporations making them may have no public functions nor be affected with a public interest. And special information obtained by the officers charged with the collection of the tax may be made public to all competitors or enemies of any corporation at the discretion of the President of the United States, all of which provisions are in violation of Articles IV and V of the Amendments to the Constitution of the United States.

Twenty-second. Your orator further shows that this suit is brought in good faith and not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance and that he has duly requested the defendant Trust Company and its Directors and each of them in writing to omit and refuse to pay and to refrain from paying said Corporation Tax and to contest the constitutionality of said act, and to refrain from voluntarily making lists, returns and statements to the Collector of Internal Revenue for the Northern District of Illinois (either for the year 1909 or for any subsequent year), and to apply to a court of competent jurisdiction to determine its liability under said act, and that a copy of said request is hereto annexed as Exhibit A, and made a part of this bill of complaint, but that said defendant Trust Company and a majority of its directors, after a meeting of the directors at which the matter and said request
32 contained in Exhibit A were formally laid before them for action have, as your orator is informed and believes, refused and still refuse and intend omitting to comply with your orator's demand and, as your orator is informed and verily believes, have resolved and determined and intend to comply with all and singular the provisions of said Act of Congress and to pay said tax equal to one per cent of its net income for the year 1909, including therein its rents from real estate and its income from municipal bonds and its returns and compensation for acting in the capacities and offices to which it has been appointed by the courts of Illinois and to comply also with the provisions of said act in all subsequent years.

A copy of the refusal of said defendant Trust Company to comply with the demand of your orator is hereto annexed as Exhibit B to this complaint.

Your orator further avers that the nine Directors of said defendant Trust Company who are individually made defendants hereto own more than a majority of the entire capital stock of said defendant Trust Company and consequently that any effort which your orator might make to have the stockholders of said defendant corporation prevent the said defendant from paying such taxes on behalf of said corporation would be ineffectual and void.

Twenty-third. Your orator further shows that if the defendant and its directors, as they propose and have declared their intention to do, pay said tax out of the net income of the defendant
33 Trust Company, they will thereby diminish the assets of said Trust Company and lessen the dividends thereon and the

value of all its shares, and that said payment will be a misapplication or diversion of its funds by an illegal payment out of its capital or profits; that the directors of said Trust Company are at law and in equity responsible for the disbursements of funds of the Northern Trust Company; that in that respect they occupy a fiduciary relation towards the said Trust Company and that any illegal payment of said funds is an improper diversion of said funds by the directors and a violation of their fiduciary duties to said Northern Trust Company, your orator and other stockholders.

Twenty-fourth. Your orator further shows that the voluntary compliance with the provisions of said corporation tax so incorporated in said Act of Congress aforesaid, will expose the defendant Trust Company to the danger of a multiplicity of suits by its numerous shareholders, and that such numerous suits would work irreparable injury to the business of the Company, and involve it in great and irreparable damage, to the irreparable damage also of your orator and all its shareholders.

Twenty-fifth. Your orator further shows that this is a suit of a civil nature in equity, that the matter in dispute exceeds exclusive of interest and costs the sum or value of five thousand dollars, and arises under the Constitution and Laws of the United States,
34 and involves the construction of the Constitution of the United States and the constitutionality and validity of an Act of Congress.

Twenty-sixth. And your orator shows that the actings, doings and pretenses of the defendants before set forth are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore, and in consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable,

Your Orator Prays:

I. That it may be adjudged and decreed that the said provisions imposing a Corporation Tax, incorporated in said Act of Congress approved August 5, 1909, are unconstitutional, null and void.

II. That the defendants be restrained from voluntarily complying with the provisions of said act and making the return or statement above referred to and described, which they threaten to make, and from paying the tax aforesaid, either for the year 1909, or for any subsequent year in which the net income of the defendant Trust Company may exceed the sum of $5,000.

III. And that your orator may have such other or further or different relief in the premises as to a court of equity may seem meet.

35 To the End, Therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said The Northern Trust Company, Chicago, under its corporate seal, and the said individual de-

fendants, not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto.

May it please your Honors to grant unto your orator *a subpœna ad respondendum* issuing out of and under the seal of this Honorable court, to be directed to the said defendants, The Northern Trust Company, Chicago; A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable court and then and there full, true, direct and perfect answer make to all and singular the premises, and further to perform and abide by such further order and decree as to your Honors shall seem meet.

And also grant unto your orator an order to issue a writ of temporary or provisional injunction restraining the defendants as hereinbefore prayed until the further order of the court, and that on the hearing of this cause the said injunction be made perpetual.

And your orator as in duty bound will ever pray.

FRED W. SMITH,
PECKHAM, BROWN, PACKARD & WALSH,
Solicitors for Complainant.

EDWARD OSGOOD BROWN,
Of Counsel.

36 UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division:

STATE OF ILLINOIS,
County of Cook, ss:

Fred W. Smith, being duly sworn, doth depose and say that he is the complainant in the foregoing bill of complaint; that he has read the bill and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief or as matters of law, and that as to those matters he believes it to be true.

FRED W. SMITH.

Subscribed and sworn before me this 15th day of January, A. D. 1910.

JOHN F. HAGEY,
Notary Public.

[SEAL.]

37 EXHIBIT A.

CHICAGO, *January* —, 1910.

To A. C. Bartlett, William A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, Byron L. Smith, Directors of the Northern Trust Company, Chicago.

GENTLEMEN: I am a shareholder in the Northern Trust Company, Chicago, and am informed that the Company intends voluntarily to comply with the requirements of the provisions relating to a "Corporation Tax" contained in the 38th section of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes," enacted at the recent special session of Congress and approved by the President August 5, 1909, and commonly called the Tariff Act. I claim that the said provisions of said Act of Congress purporting to impose a "Corporation Tax" are unconstitutional. As a shareholder in said Trust Company I hereby protest against any action of the Company and its directors in voluntarily complying with said "Corporation Tax" provisions and I request that said Trust Company and its directors shall refrain from voluntarily complying with any of said provisions and from voluntarily paying the "Corporation Tax" provided for therein, and from voluntarily making any returns or statements in compliance with said provision to the collector of internal revenue for this district.

I further request that said Company and its directors shall contest the constitutionality of said act and protect its shareholders and apply to a court of competent jurisdiction to determine its liability under the same, or take such steps as may be necessary to protect the rights of the Trust Company's shareholders.

Very truly yours,

FRED W. SMITH.

38 EXHIBIT B.

JAN. 11, 1910.

Fred W. Smith, Esq., 57 Board of Trade, Chicago.

DEAR SIR: Referring to your letter of the 3rd instant addressed to the Directors of this Company, we have to say that the Board of Directors at its meeting this day held considered the matter and we enclose a certified copy of the resolution which was passed in relation to your request.

Yours very truly,

THE NORTHERN TRUST CO.,
By ARTHUR HEURTLEY, *Secretary.*

Enclosure.

At a meeting of the Board of Directors of The Northern Trust Company, held at its office on Tuesday, January 11, 1910, the following resolution was unanimously adopted:

Resolved, that the Board of Directors of The Northern Trust Company deem it inexpedient to comply with the demand of Mr. Fred W. Smith, on the ground that failure to comply with the provisions of the Corporation Tax Law would subject this Company to litigation with the United States.

I, Arthur Heurtley, Secretary of The Northern Trust Company, do hereby certify that the above and foregoing is a true and correct copy of a resolution unanimously adopted at a meeting of the Board of Directors of The Northern Trust Company, held at its office on the 11th day of January, 1910.

In Witness Whereof, I have hereunto set my name and the corporate seal of The Northern Trust Company, this 11th day of January, A. D. 1910.

ARTHUR HEURTLEY, *Secretary.*

(Endorsed:) Filed Jan. 15, 1910. H. S. Stoddard, Clerk.

39 And on to wit, the twenty-fourth day of January, 1910, come the defendants in said entitled cause by their solicitors and enter their appearance in words and figures following, to-wit:

40 *Appearance of Defendants.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 29855.

FRED W. SMITH
vs.
THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith.

We hereby enter the appearance of each of the defendants in the above entitled cause, and of ourselves as their solicitors.

JUDAH, WILLARD, WOLF & REICHMANN,
Solicitors for Defendants.

NOBLE B. JUDAH,
Of Counsel.

(Endorsed:) Filed Jan. 24, 1910. H. S. Stoddard, Clerk.

41 And on to-wit: the twenty-fourth day of January, 1910, come the defendants in said entitled cause by their solicitors and filed in the clerk's office of said court in said entitled cause their

certain Demurrer to the Bill of Complaint in the words and figures following to-wit:

42 *Demurrer.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 29855.

FRED W. SMITH
vs.
THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith.

The Joint and Several Demurrer of Each and All of the Defendants in the Above-Entitled Cause to the Bill of Complaint of Fred W. Smith, Complainant Therein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said Bill of Complaint contained, to be true in such manner and form as the same are therein and thereby set forth and alleged, to demur to the said Bill, and for cause of demurrer, show that the said complainant has not, in and by his said Bill, made or stated such a case as doth or ought to entitle him to any relief from or against these Defendants, or any of them, touching the matters contained in the said Bill, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill of Complaint, these Defendants do demur
43 to the said Bill, and to all the matters and things therein contained, and they pray the judgment of this honorable Court, whether they, or either of them, shall be compelled to make any further or other answer to the said Bill; and they humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

THE NORTHERN TRUST COMPANY,
A. C. BARTLETT,
WILLIAM A. FULLER,
ERNEST A. HAMILL,
MARVIN HUGHITT,
CHARLES L. HUTCHINSON,
MARTIN A. RYERSON,
ALBERT A. SPRAGUE,
SOLOMON A. SMITH,
BYRON L. SMITH,
Each by JUDAH, WILLARD, WOLF & REICHMANN, *Their Solicitors.*

NOBLE B. JUDAH,
Of Counsel.

I certify that in my opinion the foregoing demurrer of the defendants to the Bill of Complaint herein, is well founded in law and proper to be filed in the above cause.

NOBLE B. JUDAH,
Of Counsel for Defendants.

44 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Athur Heurtley, being first duly sworn, on oath, deposes and says that he is the Secretary of The Northern Trust Company, one of the defendants in the above entitled cause; that he has read the foregoing demurrer to the Bill of Complaint in said cause; that the same is not interposed for the purpose of delaying said cause, or any proceedings therein.

ARTHUR HEURTLEY.

Subscribed and sworn to, before me, this 24th day of January, A. D. 1910.

[SEAL.] IRVING M. L. HOUSON,
Notary Public.

(Endorsed:) Filed January 24, 1910. H. S. Stoddard, Clerk.

45 And on the same day to-wit: the twenty-fourth day of January, 1910, being one of the days of the regular December Term of said Court, 1909, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

46 *Decree of January 24, 1910, Sustaining Demurrer and Allowing Appeal.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29855. In Equity.

FRED W. SMITH, Complainant,
vs.
THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, Defendants.

This cause having come on to be heard upon the Bill of Complaint and the Demurrer thereto heretofore filed herein, and the Court being fully advised in the premises,

It is ordered that the said demurrer be and the same is hereby sustained and that the Bill of Complaint of the Complainant herein be and the same is hereby dismissed at Complainant's costs.

Thereupon the above named Complainant states to the Court that in this case the constitutionality of a law of the United States is drawn in question and prays an appeal from said final decree, dismissing the Bill of Complaint herein, direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided. And the Court being fully advised in the premises, and an assignment of errors having been duly filed,

It is ordered that the said appeal to the Supreme Court of the United States be and the same is hereby allowed as prayed for upon the Complainant filing his appeal bond in the usual form in the penal sum of Five Hundred Dollars, and the said defendants now admit in open court due notice of said appeal and duly waive service of any citations thereon.

47 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause by his solicitors and filed in the clerk's office of said Court his certain Petition for appeal in the words and figures following to-wit:

48 *Petition for Appeal.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29855. In Equity.

FRED W. SMITH, Complainant,

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Ernest A. Hamill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith, Defendants.

The above named Complainant, conceiving himself to be aggrieved by the order or decree made and entered in the above entitled cause on January 24, A. D. 1910, dismissing the Bill of Complaint herein for want of equity, hereby appeals from said order or decree to the Supreme Court of the United States for the reasons specified in the Assignments of Error filed herein and prays that this appeal may be allowed and that a transcript of the record and all proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

PECKHAM, BROWN, PACKARD & WALSH,
Counsel for Complainant.

(Endorsed:) Filed Jan. 24, 1910, H. S. Stoddard, Clerk.

49 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause by his solicitors and filed in the clerk's office of said Court in said

entitled cause his certain assignment of errors in the words and figures following to-wit:

50 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29855. In Equity.

FRED W. SMITH, Complainant,

vs.

THE NORTHERN TRUST COMPANY, A. C. BARTLETT, WILLIAM A. Fuller, Earnest A. Hamill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith, and Byron L. Smith, Defendants.

Now comes Fred W. Smith, Complainant herein, and files the following Assignments of Error to the decree of the Circuit Court herein, upon which he relies for grounds of reversal on appeal:

1. The said Circuit Court erred in sustaining the demurrer of the defendants to the Bill of Complaint herein.

2. The said Circuit Court erred in dismissing the Bill of Complaint herein at the Complainant's costs.

3. The said Circuit Court erred in not over-ruling the demurrer herein and entering a decree in accordance with the prayer of the Complainant's bill.

FRED W. SMITH,
By PECKHAM, BROWN, PACKARD & WALSH, *His Solicitors.*

(Endorsed:) Filed Jan. 24, 1910, H. S. Stoddard, Clerk.

51 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause and filed in the clerk's office of said court a certain Bond on appeal in the words and figures following to-wit:

52 *Bond on Appeal.*

Know all men by these presents, That we, Fred W. Smith, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto The Northern Trust Company, A. C. Bartlett, William A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said The Northern Trust Company, A. C. Bartlett, William A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and

Byron L. Smith, their certain attorneys, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals and dated this 24th day of January, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a term of the United States Circuit Court for the Northern District of Illinois, Eastern Division, in a suit depending in said Court, between Fred W. Smith, as complainant, and The Northern Trust Company, A. C. Bartlett, William A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles S. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, as defendants, a decree was rendered against the said Fred W. Smith, complainant, and the said Fred W. Smith having prayed for an appeal to reverse said decree and the same having been allowed by said Circuit Court, and the issuance of a citation having been expressly waived in open court by the said defendants.

53 Now, the condition of the above obligation is such, That if the said Fred W. Smith shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FRED W. SMITH. [SEAL.]
FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
[SEAL.] By ARTHUR C. ARNOLD,
Agent and Attorney in Fact.

Approved January 24, 1910,
KOHLSAAT,
Circuit Judge.

(Endorsed:) Filed Jan. 24, 1910, H. S. Stoddard, Clerk.

54 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, H. S. Stoddard, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court in the cause entitled Fred W. Smith vs. The Northern Trust Company, A. C. Bartlett, William A. Fuller, Ernest A. Hammill, Marvin Hughitt, Charles L. Hutchinson, Martin A. Ryerson, Albert A. Sprague, Solomon A. Smith and Byron L. Smith, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of said Court, at my office in the city of Chicago, in said District, this twenty-fourth day of January, 1910.

[Seal of Circuit Court U. S., Northern District Illinois, 1855.]

H. S. STODDARD, *Clerk,*
By JOHN H. R. JAMAR,
Chief Deputy Clerk.

Endorsed on cover: File No. 21,979. N. Illinois C. C. U. S. Term No. 753. Fred W. Smith, appellant, vs. The Northern Trust Company, A. C. Bartlett, William A. Fuller, et al. Filed January 26th, 1910. File No. 21,979.

[redacted]

SUPREME COURT OF THE [redacted]

[redacted]

No. [redacted]

[redacted]

vs.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 753.

FRED W. SMITH

vs.

THE NORTHERN TRUST COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO ADVANCE UNDER RULE 26.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Fred W. Smith, appellant herein, and respectfully moves this honorable court that the above-entitled cause may be advanced upon the docket of this court and set down for argument and hearing at an early date to be fixed by the court herein, and for grounds of said motion shows to the court as follows:

I.

In this case Fred W. Smith, a stockholder of The Northern Trust Company, filed his bill against said company and its directors to restrain the defendants from complying with the provisions of section 38 of an act of Congress of the United

States entitled "An act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, by making and filing with the collector of internal revenue for the First District of Illinois, prior to the first day of March, 1910, the statement or return required under the provisions of said act, and by paying on or before June 30, 1910, the tax provided for by said act upon the entire net income of the said defendant, The Northern Trust Company. The bill further prayed that it might be adjudged and decreed that said section 38 of said act, otherwise known and referred to as the Corporation Tax Act, should be adjudged to be unconstitutional and null and void.

II.

The defendants filed a general demurrer to this bill, and upon their motion the demurrer was sustained, the bill dismissed, and an appeal to this court prayed and allowed.

III.

The facts as alleged in the bill show that the defendant is the owner of one hundred and forty shares of the capital stock of the corporation of a par value aggregating $14,000; that the directors of the corporation have determined that it is liable to pay and that they intend to pay for it to the Federal Government on or before June 30, 1910, the tax provided by the act, and that it is their intention and purpose voluntarily to file with the collector of internal revenue the statement or return under oath of its president, vice-president, or other principal officer, setting forth the assets and income of said corporation, as provided for by said act; and that the directors have taken the position that they, each successive year after 1909, intend voluntarily to pay, in each successive year, the amount of the tax provided for by the act.

IV.

The Northern Trust Company, as shown by the bill, is a corporation authorized by the laws of Illinois to do a general banking business, to receive deposits and loan money on personal and real-estate security, and is authorized by the laws of Illinois to accept and execute trusts of every description, and is further authorized to act under the appointment of any court of competent jurisdiction as trustee, receiver, assignee, guardian, conservator, executor, or administrator. The bill further shows that the trust company owns and holds in its own right real-estate worth more than one million dollars, and that it owns and holds interest-bearing bonds of cities and other municipal corporations worth not less than one million four hundred thousand dollars, and that a large portion of the income of said trust company is derived from the sources above mentioned.

V.

The bill alleges that the provisions of section 38 aforesaid, referred to as the Corporation Tax, are in conflict with the provisions of the Constitution of the United States, and are null and void because:

(1) The tax is a direct tax and is not apportioned among the several States according to their proportion, as required by section 2, article 1, and paragraph 4 of section 9 of article 1 of the Constitution.

(2) If the tax is not a direct tax, but can be held to be a duty, impost or excise, then the provisions of the law are unconstitutional as not being uniform, as required by section 8, article 1, of the Constitution of the United States.

(3) Even if the Corporation Tax were held not to be a direct tax, nor a tax on property or income, and were also

held to be uniform throughout the United States, it is unconstitutional as not being within the power of Congress to enact, since it interferes with the reserved rights and sovereignty of the several States, by which State corporations such as the said appellee The Northern Trust Company were created, and in conflict particularly with article 10 of the amendments to the Constitution of the United States.

VI.

The matters involved herein are of great and general public interest and importance, and unless an adjudication by this honorable court as to the constitutionality of the law in question is speedily obtained, a great number of corporations affected by the provisions of this act will pay the amount of the tax levied against them under a protest and commence actions to recover the same, thereby involving the representatives of the United States Government in a multiplicity of suits.

VII.

This appellant is advised that a motion to advance under Rule 26 was filed herein on January 24, 1910, by the appellant in the case of Flint *vs.* The Stone Tracy Company, No. 747 on the docket of this court. This last-mentioned case involves the constitutionality of the Corporation Tax Law, and this appellant is also advised that the questions raised by him in his bill of complaint as aforesaid are in many respects different, and raise other considerations than, and different considerations from, those raised by and involved in the said Flint case with respect to the constitutionality of said act.

VIII.

This appellant therefore prays this honorable court that this case may be advanced upon the docket under the provis-

ions of Rule 26 of this court, to be set down at an early day for argument and hearing.

A notice of this motion has been served upon counsel for the appellees and proof of service filed with the clerk of this court, and the Solicitor General of the United States has been notified that this motion would be submitted.

Respectfully submitted,

ORVILLE PECKHAM,
EDWARD OSGOOD BROWN,
GEORGE PACKARD,
VINCENT J. WALSH,
Counsel for Appellant.

Supreme Court U. S.
FILED
MAR 7 1910
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1909.

No. 441

FRED W. SMITH,
Appellant,

vs.

THE NORTHERN TRUST COMPANY AND OTHERS,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

EDWARD OSGOOD BROWN,
Of Counsel for Appellant.

GEORGE PARKER and
VINCENT J. WALSH,
Also of Counsel.

PARKER, BROWN, PARKER & WALSH,
Solicitors for Appellant.

(21979)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

FRED W. SMITH,
Appellant,

vs.

THE NORTHERN TRUST COMPANY AND OTHERS,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF THE CASE.

This is an appeal from the Circuit Court of the United States for the Northern District of Illinois from a decree of that court sustaining a general demurrer to a bill in equity filed by the complainant and dismissing the bill at complainant's costs.

The appeal was taken direct to this court because the constitutionality of an act of Congress is involved. Except a possible question of jurisdiction, settled, as we understand, by previous decisions of this court, there is indeed no other matter involved in

the appeal than the constitutionality of Section thirty-eight of the Act of Congress entitled, "An Act to Provide Revenue, Equalize Duties and Encourage Industries of the United States and for Other Purposes," approved August 5, 1909, and commonly known as "The Corporation Tax Law" of the United States.

The bill alleges in detail and in apt, artificial language that the complainant, Fred W. Smith, is a resident and citizen of Illinois and the owner and registered holder of one hundred and forty shares (of the par value of fourteen thousand dollars) of the stock of the principal defendant, The Northern Trust Company, a corporation organized and existing under various acts of the General Assembly of Illinois; that he is informed and believes that the said Northern Trust Company and its directors, whom he makes defendants to the bill, intend voluntarily to make a return to the Collector of Internal Revenue for the First District of Illinois, of the net income of the Northern Trust Company, and of the other matters required to be stated in relation to its business for 1909, within the time required by the act for such return, and to pay, within the time required by the act for such payment, the tax of one per centum on its entire net income over five thousand dollars, provided for by said act. This tax

would, according to the allegations of the bill, be more than two thousand dollars, the net income of the defendant corporation for the year 1909 being over $250,000.

The complainant alleges that the provisions of said Section 38 of the Act of August 5, 1909, are unconstitutional, null and void and furnish no justification for the payment of said tax or for the return as contemplated and intended by the defendants, and that he has requested the defendant Company and its directors to refuse to pay the tax for said Company or to make the return, and to contest the constitutionality of the law, but that they have refused his request; and that as the directors of said Northern Trust Company own more than a majority of the entire capital stock of said Company, no effort on the part of the complainant looking to action of the stockholders to prevent the return or payment could be effectual.

The payment of the tax, the complainant alleges, would be a misapplication or diversion of the funds of the defendant corporation by its directors to the injury of the complainant, and a violation of the fiduciary duties of said directors to the complainant and the other stockholders.

Wherefore, the complainant asks an injunction against the defendants voluntarily making either re-

turn or payment under the law in question, which he asks may be adjudged unconstitutional, null and void.

The bill in its successive paragraphs, from the first to the seventh, describes the nature, the business and the property of the defendant the Northern Trust Company; showing that its capital stock, surplus and accumulated profits exceed $3,500,000; that it is by law authorized to do a general banking business and to take and execute trusts, and that it may, by express statute of the State of Illinois, be appointed by any court of competent jurisdiction in Illinois, trustee, receiver, assignee, guardian, conservator, executor or administrator; and that any such court, also by express statute, may order any such officer of which it has jurisdiction to deposit any funds in his hands, as such officer, with the said Northern Trust Company, and thereafter the officer shall be relieved from further responsibility for said funds.

To qualify itself to act under these laws the complainant was obliged to and did make certain deposits with the Auditor of Public Accounts of the State of Illinois, and to make certain reports of its affairs and business to said Auditor.

Thus, the complainant alleges, the Northern Trust Company

"was made by the effect of the statutes of Illi-

> nois and its compliance therewith, in an especial and peculiar sense an instrumentality and a part of the governmental machinery of the State of Illinois,"

and has as a matter of fact been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases, and in its trust capacity under such appointments, now holds, and is administering real and personal property of the aggregate value of many millions of dollars.

It is also alleged that the said Northern Trust Company owns and holds in its own right real estate in Chicago of the value of more than one million dollars, part of which is leased out to a tenant for the annual rental of nine thousand dollars.

That said defendant Trust Company

> "owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations of the value of not less than one million four hundred thousand dollars and that all of the cities, counties, parks and municipalities whose bonds are so held by the Trust Company are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states,"

and that said defendant Trust Company derives nine thousand dollars of its income annually from the rents of its absolutely owned real estate, more than fifty thousand dollars annually from its investments in interest bearing bonds of municipal corporations,

and a considerable and valuable income from its frequent appointment by the courts as Trustee, Receiver, Assignee, Guardian, Conservator, Executor, Administrator, and from the orders made by courts requiring or allowing such officers to deposit moneys with it.

The bill also alleges that the defendant the Northern Trust Company, has held and is executing numerous trusts, committed to it by various parties and by various means and holds as trustee for many minors, individuals, copartnerships, associations, and corporations resident in the United States and elsewhere, many parcels of real estate exceeding a thousand in number.

The bill contains in its successive paragraphs from 14 to 21, particular averments concerning the unconstitutionality of said Corporation Tax Law.

Thus:

PARAGRAPH FOURTEEN:

Asserts that the said law is a direct tax in respect to the real estate held and owned by the Northern Trust Company and in respect to its personal property, and that although a direct tax, it is not apportioned among the states in proportion to their population as required by Section 2 and by Paragraph 4 of Section 9 of Article 1 of the Constitution.

PARAGRAPH FIFTEEN:

Asserts that if the Corporation Tax should not be held a direct tax, but to fall under the denomination of an "Excise Tax" or any other than a "Direct Tax," then the provisions of the law are unconstitutional because they are not *uniform* throughout the United States. Uniformity, the bill claims, is explicitly required by Section 8 of Article 1 of the Constitution of the United States, as to all "duties, imposts, and excises," and is "implicitly required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax."

Subdivisions of this Paragraph 15, assert

A. That the Corporation Tax is not uniform as to *property, class or subject,* because although imposed upon corporations created and organized entirely under state laws and made by those laws persons resident in said states with all the rights of natural persons and of citizenship in those states, it is not imposed on other individuals or persons in said states or on copartnerships or associations not having a capital stock represented by shares, who are carrying on the same or similar business under

like conditions and in the same localities and having like property and income.

B. That the said tax is not uniform even among corporations, as a great number of corporations, notably in Chicago where the defendant corporation is situated, having a less net income for 1909 than $5,000, are exempted from the operation of the tax.

C. That the said tax is not uniform even among corporations in that in almost all localities where the tax would be operative there are a large number of corporations organized under state laws, which derive their income entirely from dividends upon stock of other corporations, joint stock companies and associations and insurance companies subject to said Corporation Tax, and whose entire income was so derived during the year 1909, and that said corporations by the effect of the law are equally with natural persons and copartnerships exempted from said Corporation Tax.

D. That the said tax is not uniform because of the existence of a large number of corporations organized under state laws, which derive a part of their income from such dividends from other corporations and that the tax upon such corporations is calculated at a different rate from the tax imposed upon other corporations doing a similar business under like con-

ditions, and deriving no part of their income from such dividends.

E. That the tax is not uniform in that its effect would be to lessen the income from dividends of the shareholders of such corporations as are subject thereto, and thus operate as a Federal Income Tax on such persons while all other persons resident in the United States are exempt from any Federal Income Tax.

F. That the tax is not uniform in its effect upon corporations alone even, because of the exemptions therein contained of certain organizations named; said exemptions and classifications being arbitrary and unreasonable and based on no uniform or equitable classification, and many other corporations which by the terms of the Corporation Tax Law are subject to the Corporation Tax being equally with those that are thus exempted, organized and operated as fully for the mutual benefit of their members as those which are thus exempted.

G. That if the Corporation Tax were held to be an Excise Tax and a tax or license fee upon the privilege of doing business as a corporation and thus exercising a corporate franchise, it would not be uniform throughout the United States because the incidents, privileges, immunities, obligations, and liabilities pertaining to a corporate franchise or its

exercise are not the same in all the states, but vary widely between different states and even between different classes of corporations in the same state.

Illustrations are pointed out in the bill of this variance and it is asserted that a tax on the privilege of existing as a corporation and exercising a corporate franchise is neither uniform as to the different states of the United States nor as to the corporations within each state. Thus geographical as well as other uniformity is lacking.

H. That the tax is not uniform in other respects not specifically pointed out.

PARAGRAPH SIXTEEN:

Asserts that if said Corporation Tax were held not to be a direct tax, nor a tax on property or income, and were also held to be uniform throughout the United States within the meaning of the Constitution of the United States, yet it must be held unconstitutional and void, as interfering with the reserved rights of the states under the 10th Amendment to the Constitution.

In this paragraph it is more particularly alleged that the tax in question is not an excise tax, but whether so or not is, if not a direct tax on property or income, either a tax upon the privilege of existing as a corporation or a tax upon the privilege of doing business in a corporate capacity. In either

case the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the states to grant franchises of corporate capacity and the value and purpose of the franchises and privileges which the states have full power to grant.

It is further alleged that the tax is imposed on a great number of public service corporations in the various states, which perform public and semi-public intra-state functions, and have been given the power of eminent domain by the state for the purpose of enabling them to carry out said functions, and have thus respectively been made the direct instrumentalities and agents of the state creating them, with which Congress has no power to interfere.

The inclusion of these corporations in the operation of the law would by itself, it is alleged, render the law unconstitutional, but it is also claimed that in a wider sense all corporate franchises and all rights granted by a state to exist as corporate entities are instrumentalities of that state in the exercise of its reserved powers and functions, and cannot be constitutionally taxed or interfered with by the Congress of the United States.

PARAGRAPH SEVENTEEN:

Alleges that the reasons for holding the law unconstitutional, alleged in paragraph sixteen, apply

with especial force to the case of the defendant corporation in that it is a creation of the State of Illinois, that there has been given to it by the state the authority to perform the various public functions set forth in the second paragraph of the bill, and that by the courts of Illinois it has been given the responsibilities and placed under the obligations of such performance in many cases, and that the net income on which the Corporation Tax is imposed, or by which it purports to be measured, is in its case partly derived from legitimate compensation allowed to it by the court for the discharge of the functions and duties thus imposed on it.

PARAGRAPH EIGHTEEN:

Alleges the tax to be unconstitutional because it is an income tax upon the incomes of many corporations, including the defendant corporation, derived partly from state bonds and municipal bonds issued under state authority, and United States bonds, and that these bonds are not within the taxing power of Congress.

It is particularly alleged in this paragraph that the respective bonds of the state and of their governmental agencies, the counties and municipalities therein, are, together with the power of the states to borrow in any form, exempt from federal taxation; and

That the income and interest from said bonds constitute a considerable proportion of the net income of many of the corporations on which the Corporation Tax purports to be imposed, and that it was and is the intention of Congress and is essential and necessary to accomplish the purpose and general scope of the Corporation Tax; that these corporations and the income thus derived should be covered by the law.

PARAGRAPH NINETEEN:

Alleges the provisions of the Corporation Tax Law to be unconstitutional in that they impair property rights vested prior to the passage of the act, and in that they purport to impose a tax on the net income of corporations which accrued prior to August 5, 1909, the date on which said act became a law, or else purport to impose a tax on the privilege of doing business as a corporation prior to said August 5, 1909.

PARAGRAPH TWENTY:

Alleges the law in question to be unconstitutional in that all corporations thereby taxed, may, under its provisions, be deprived of their property without due process of law in violation of Article V of the Amendments to the Constitution.

PARAGRAPH TWENTY-ONE:

Alleges that the provisions of the Corporation Tax Law are unconstitutional in that all corporations thereby taxed may be compelled to disclose their private books and papers in order to make them liable to a penalty or to forfeit their property, and in any event are obliged to make returns of their private business in such manner that they become public records, open to competing and hostile examination, although the said corporations making them may have no public functions nor be affected with a public interest, and in that special information obtained by the officers charged with the collection of the tax may be made public to all competitors or enemies of any corporation at the discretion of the president, all of which provisions are in violation of Articles IV and V of the Amendments to the Constitution.

There are formal allegations in the bill negativing collusion to confer jurisdiction and asserting as grounds of jurisdiction additional to that of the threatened diversion of funds by the directors and breach thereby of their fiduciary duties, that the voluntary compliance with the provisions of the law will expose the defendant Trust Company to the danger of a multiplicity of suits by its numerous

shareholders, and that such numerous suits would work irreparable injury to the business of the defendant Company and the irreparable damage of its stockholders.

To this bill there was filed a joint and several demurrer of each and all of the defendants.

The Circuit Court, as above indicated, sustained the demurrer and dismissed the bill and this appeal was taken.

It was advanced for hearing under Rule 26.

Assignment of Errors.

The assignment of errors on the record are simply that the Circuit Court erred in sustaining the demurrer of the defendants; that it erred in dismissing the bill of complaint; and that it erred in not overruling the demurrer and entering a decree in accordance with the prayer of the bill.

This is equivalent to the particular ground on which we rely for reversal, which is, that the Section 38 of the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage industries of the United States, and for other purposes," is unconstitutional, null and void for the reasons set forth in the bill, and that the court below should have so found and enjoined the defendants from complying with it as prayed.

BRIEF OF ARGUMENT.

I.

Our bill (abstracted in the "Statement") sets out in Paragraphs and Sub-paragraphs—pages 2 to 15—the various grounds on which we attack the constitutionality of the Corporation Tax Law. We rely on them all but to avoid burdening the court with repetition shall argue only those following.

Argument, pages 27 to 30.

II.

The cases of *Pollock* v. *Farmer's Loan & Trust Co.* and *Hyde* v. *Continental Trust Co.*, 157 U. S., 429, and 158 U. S., 601, set at rest the questions involved therein.

We shall not, for reasons set forth in our argument, discuss preceding cases claimed to be inconsistent therewith.

Argument, pages 30 to 32.

III.

The question of jurisdiction in the present case is controlled by the *Pollock* cases, and however grave as a matter of first impression, is no longer open.

Corbus v. *Alaska Treadwell Gold Mining Company*, 187 U. S., 455, distinguished.

Argument, pages 32 to 34.

IV.

The *Pollock* cases decided (1) that taxes on the rents and income of real estate are direct taxes, and subject to the rule of apportionment; (2) that taxes on the income of personal property are direct taxes, subject to the same rule; and (3) that the Income Tax Law constituted one entire scheme of taxation and being invalid as to the income from real estate and personal property, was invalid as a whole.

The Corporation Tax—if it be an income tax—falls within the effect of each of these conclusions.

Argument, pages 34 to 42.

Under this point we urge:

(a) That in the case at bar the tax, if it be an income tax, falls on income of The Northern Trust Company from both real estate and invested personalty, including the bonds of municipal corporations.

Argument, pages 36, 37 and 41.

(b) That equally with the Income Tax Law of 1894 the Corporation Tax Law of 1909 is one entire scheme of taxation, and being so, must fail as a whole if it fails in essential parts. Citing:

Pointdexter v. *Greenhow*, 114 U. S., 270.
Spraigue v. *Thomson*, 118 U. S., 90.
Warren v. *Charlestown*, 2 Gray, 84.
Argument, pages 37 to 42.

V.

The Corporation Tax is an Income Tax, and being unapportioned is unconstitutional.

Despite the attempt of its framers by mere phraseology to negative the idea that it is an income tax, it remains so because of its essential character and substance.

Stockard v. *Morgan*, 185 U. S., 27.
Asbell v. *Kansas*, 209 U. S., 251.
Galveston, Harrisburg and San Antonio Railway Co. et al. v. *Texas*, 210 U. S., 217.
Argument, pages 41 to 48.

Under this we contend:

(a) That while a tax in certain cases may be laid on an intangible right or privilege in proportion to the value of some other property without being a tax on that property (as held in *R. R. Co.* v. *Collector*, 100 U. S., 595; *Home Insurance Co.* v. *New York*, 134 U. S., 594; *Plummer* v. *Coler*, 178 U. S., 115; *Delaware Railroad Tax*, 18 Wall., 206; *New York* v. *Roberts*, 171 U. S., 658), this is only true (1) where the value of the property by which the tax is gauged is a reasonable measure of the value of the

intangible right or privilege, or (2) where the intangible right might be altogether taken away by the taxing government and may therefore be conceded only on such conditions as that government pleases.

(b) That neither of these conditions exists as to the Corporation Tax Law. It is not within the power of Congress to deny or concede to the corporations affected their right to exist or to do business, nor is the tax proportioned to business done by them or conditioned upon their doing business at all. It falls directly on their income from all sources.

(c) That the case of *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S., 397, relied on to sustain the constitutionality of this tax as an excise tax is not in point. Its true effect is to the contrary.

VI.

If the Corporation Tax should be held not to be an income tax but an indirect tax, it must be held to be a discriminating license or privilege tax, merely arbitrarily measured by the income of the persons selected for taxation. The question then recurs: For what privilege is the tax to be paid?

It cannot be the privilege of holding property, for that would make the tax identical with a tax on property and direct. It must, in the case of a corporation, be either the privilege of existing as a

corporation or of doing business as a corporation. While it makes little difference to our argument, we contend that it must be the privilege of existing as a corporation rather than doing business as a corporation for the tax is neither proportioned to nor conditioned on the doing of business. In the case of joint stock companies and insurance companies, the tax must be on the privilege of existing as such companies.

Argument. pages 49 to 61.

VII.

Whether a tax on the privilege of being a corporation or of doing business as a corporation, the Corporation Tax is subject to the rule of "uniformity," which is *implicitly* required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax.

The Corporation Tax violates this implicitly required uniformity. Its selection of the persons to be taxed for the privilege of existence or of doing business is so "arbitrary and confiscatory" that it "transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Therefore this court should interfere.

Knoulton v. *Moore*, 178 U. S., 41.

The corporations created by the states are to the United States in the same relation as natural persons who are citizens of those states and cannot be arbitrarily selected for taxation on the privilege of existing or doing business.

Louisville C. & C. R. Co. v. *Letson*, 2 Howard, 497.

Marshall v. *Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

Ohio & M. R. Co. v. *Wheeler*, 1 Black, 286.

Bank of Augusta v. *Earle*, 13 Peters, 519.

St. Louis v. *Wiggins Ferry Co.*, 11 Wallace, 423.

San Bernardino County v. *Southern Pacific R. R. Co.*, 118 U. S., 417 (Opinion of Mr. Justice Field).

Pembina C. S. M. & M. Co. v. *Pennsylvania*, 125 U. S., 181.

C. C. & A. R. Co. v. *Meekey*, 142 U. S., 386.

Argument, pages 61 to 67.

VIII.

The Corporation Tax if not a direct tax is subject to the express requirement of "uniformity" in Section 8, Article 1, of the Constitution.

Even if the *expressly* required "uniformity" is merely a geographical uniformity between the states,

as held in *Knowlton* v. *Moore* (*supra*) and *Patton* v. *Brady*, 184 U. S., 608 (see, however, the concurring opinion of Mr. Justice Field, with whom three other members of the court agreed on this point in *Pollock* v. *Farmers Loan & Trust Company*, 157 U. S., 586), the Corporation Tax does not conform to it.

Argument, pages 68 to 76.

Under this point we contend that as the right or privilege of existing as a corporation or as a joint stock company or as an insurance company and the right or privilege of doing business as any one of them are very different things in one state from what they are in another, because of the differing laws of the states (for example, freedom of a corporation stockholder from individual liability exists in New Jersey but not in California), and as this court takes judicial notice on this appeal of the laws of all the states (*Hanley* v. *Donoghue*, 116 U. S., 1; *Fourth National Bank* v. *Francklyn*, 120 U. S., 747; *Case* v. *Kelly*, 133 U. S., 21; *Mills* v. *Green*, 159 U. S., 651), the Corporation Tax is within the judicial knowledge of the court unequal and wanting in uniformity between the states.

IX.

The Corporation Tax is unconstitutional whether direct or indirect and whether uniform or not, because it is an attempted interference with the instrumentalities of the states.

McCullough v. *Maryland*, 4 Wheaton, 316.

Collector v. *Day*, 11 Wallace, 113.

United States v. *Baltimore & Ohio Railroad Co.*, 17 Wallace, 322.

Railroad Co. v. *Peniston*, 18 Wallace, 5.

California v. *Central Pacific R. R. Co.*, 127 U. S., 1.

Ambrosini v. *United States*, 187 U. S., 1.

Argument, pages 77 to 91.

Under this point we first contend:

(a) That the supposed power of Congress to impose this tax involves the power to destroy the power of the states to grant franchises or privileges of corporate capacity and the value and purpose of such franchises and privileges.

(b) That such power to grant acts of incorporation is practically unlimited in the states and incident to sovereignty.

Briscoe v. *The Bank of Kentucky*, 11 Peters, 257.

(c) That the tax is on the existence of a corporation and involves the right to destroy it.

(d) That while as held in *Knoulton* v. *Moore* Congress may tax, even though it involves the power to destroy, some business or property right of a citizen or corporation, it has not the power to tax and thus destroy the right of existence of a corporation. Such a power would be tantamount to a power to tax the right to create such an existence.

California v. *Central Pacific Railroad Company*, 127 U. S., 1.

Collector v. *Day*, 11 Wallace, 113.

Van Brocklin v. *Tennessee*, 117 U. S., 151-178.

(e) That the cases of *Knoulton* v. *Moore* and *Veazie Bank* v. *Fenno*, 8 Wallace, 533, which we discuss, hold nothing to the contrary of our contention.

Argument, pages 80 to 86.

And, secondly, we contend under this point:

(a) That whatever may be said of other corporations, public service corporations in private hands furnishing transportation, water, light, or performing other public or semi-public functions, are instrumentalities of the state in the strictest sense and for that reason are given the power of eminent domain; that the functions of many of them are indeed governmental, *e g.*, the functions of water companies.

Rogers Park Water Co. v. *Fergus*, 180 U. S., 624.

Freeport Water Company v. *Freeport City*, 180 U. S., 587.

Danville Water Company v. *Danville City*, 180 U. S., 619.

(b) That the inclusion of these public service corporations is a part of the intent under which the law was passed as an "entire scheme of taxation," and if it fails as to them it must fail as a whole—under the holding in the *Pollock* case.

Argument, pages 86 to 91.

X.

Finally,—we contend that under the allegations of our bill the Corporation Tax Law is an invalid and unenforceable enactment as against the defendant corporation in this case—The Northern Trust Company—because it is shown by those allegations that said company is in an especial manner an agency of the legislative and judicial departments of the government of Illinois, and that in its case therefore the Corporation Tax is in a peculiar and especial sense an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers;

Argument, pages 92 to 94.

And also,—that the income of municipal bonds to a very large amount is included in the income on which the Northern Trust Company threatens to pay one per centum as a tax, that such income from instrumentalities of state governments has been explicitly declared by this court untaxable by Congress directly or indirectly for any purpose whatever (*Pollock* v. *Trust Co.*, 157 U. S., at page 584 *et seq.*), and that this threatened action should be enjoined, independently of all other considerations.

Argument, pages 94 and 95.

ARGUMENT.

(The dividing Roman numerals relate to the corresponding numbering in the preceding Brief or Abstract of the Argument.)

I.

The bill in this cause sets out clearly the grounds on which the constitutionality of the law involved is attacked. We submit that upon all and each of the grounds alleged it is invalid. There are several cases involving the constitutionality of this law, to be heard together. Many of these grounds are set forth with equal force by the other parties appellant, and from the ability and learning of the counsel who represent those parties, we know that these grounds will be argued by them in this hearing with great thoroughness. Therefore, without waiving any of the matters stated in our bill in this case or being willing to be understood to minimize in any degree the gravity and conclusiveness of the various constitutional objections to the law which our bill points out, we do not conceive it will aid the court to elaborate in detail in our brief and argument all or many of them and thus by duplication of citations and syllogisms place on the court an unnecessary and superfluous burden. This would be the less justifiable because the matter in-

volved—the limitations of the taxing power of Congress—although of such immense importance, is one with which the members of the court are necessarily as familiar as counsel, however diligent, conscientious and ardent, can have possibly made themselves.

It has been the subject of its most serious consideration many times since the institution of the Government. In nothing have the wisdom, the learning and the courage of this great tribunal been more signally exemplified than in its treatment of it.

All the authorities of importance which counsel can cite on the questions involved are the utterances of this court.

These utterances are of necessity familiar to it. They must be the more so because in all the later ones, made while a large portion of the personnel of the court was the same as now, the earlier ones were discussed and distinguished, and where need was, limited and modified.

The vigor of the dissent and the thoroughness and force with which the views of the minority of the court were set forth in some of the later cases, for example in those which must of necessity prove of greatest (and as we contend of controlling) importance in the discussion of the cases at bar, but add dignity, strength and conclusiveness to the equally

well considered conclusions of the majority who were unconvinced by them, and whose opinions voiced by the Chief Justice declared for this court and therefore for the country the construction which the constitution must bear as applied to the questions involved in those cases.

We allude, of course, to *Pollock* v. *Farmer's Loan & Trust Co.*, and *Hyde* v. *Continental Trust Co.*, argued together twice, and reported in 157 U. S., 429, and 158 U. S., 601, which we shall hereafter cite merely as the *Pollock* cases.

II.

In view of the wealth of argument analytical and historical with which in the arguments of counsel on either side and in the various opinions of judges in the *Pollock* cases, the opinions of this court in *Hylton* v. *The United States*, 3 Dallas, 171; *The Pacific Insurance Company* v. *Soule*, 7 Wallace, 433; *Veazie Bank* v. *Fenno*, 8 Wallace, 533; *Scholey* v. *Rew*, 23 Wall., 331, and *Springer* v. *The United States*, 102 U. S., 586, were discussed, we shall not attempt to construe those cases or to comment on them save only as any one of them may seem to be relied on to establish some proposition unrelated to those which we believe were forever set at rest in the *Pollock* cases. They were of supereminent importance in the

discussion of those latter cases, and were so recognized by court and counsel alike, but the proper scope to be given them, the limitations to which they were to be held, and their varying degrees of authority were so settled in the *Pollock* cases, that we shall leave to others, if they will, to reopen a discussion on them. We shall treat as the fundamental and basic legal positions on which the constitutionality of the Corporation Tax Law is to be adjudged, the conclusions of the court embodied in the opinions of the majority in the *Pollock* cases. Behind them, to discuss the questions involved in those cases, and to distinguish preceding cases which have been claimed to be inconsistent with them we shall not go. The deluge may be taken for granted.

This was indeed the position taken by the framers and proponents of the law under discussion. It is a matter of common knowledge that it was passed as an alternative to an Income Tax, *co nomine,* on the incomes of persons natural or artificial. It was so passed because the decision of the *Pollock* cases stood like an impassable wall between the desires of those who wished such an unapportioned income tax, and its enforcement if passed. It was recognized that this tribunal would be unlikely to depart in less than two decades from judgments so thoroughly considered and so carefully weighed. Moreover,

it was then, and it is now, the natural conclusion of all thoughtful men, that it would injure the prestige of and even weaken the confidence of the people in all courts for this court to overrule a decision which upon such elaborate argument and elaborate consideration it had rendered against the constitutionality of an Act of Congress.

III.

For the same reason we shall not linger over a discussion of the jurisdiction of the courts below and of this court over the cases at bar. We are entirely willing to concede the gravity of the question raised by the existence of the Act of 1867, which is Section 3224 of the Revised Statutes of the United States, providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." That question was thoroughly discussed in the dissenting opinion of Mr. Justice White in the first hearing of the *Pollock* cases. But we submit that it can not for a moment be supposed that the court will now, in these cases, recede from the position which Mr. Chief Justice Fuller so tersely stated in the opening paragraphs of the opinion of the court in that same hearing:

> "The jurisdiction of a court of equity to prevent any threatened breach of trust in the mis-

application or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. *Dodge* v. *Woolsey*, 18 Howard, 331; *Hawes* v. *Oakland*, 104 U. S., 450.

"As in *Dodge* v. *Woolsey*, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of and paying an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury."

This fully disposes for the cases at bar of the question of jurisdiction, however grave it might be and was considered as a question of first impression. The cases at bar are, so far as this matter is concerned, precisely similar to the *Pollock* case and the *Hyde* case, and we do not need to make the additional suggestion that in these cases, no more than in the *Pollock* cases, have the defendants or the Department of Justice, which represents them, raised below or insisted on here this objection, or that of an adequate remedy at law. "So far as it is within the power of the Government to do so," undoubtedly the question of jurisdiction will be waived, for nothing can be more important than for the Treasury Department and its officers, and the Department of Justice and its officers to have from this court, before the payment of the tax becomes due, an authoritative statement on its widely contested validity. Without it, the litigation which will

flood the courts of the country by suits against collectors to whom money has been paid under protest or who are alleged to have made illegal exactions, will be overwhelming and intolerable.

Corbus v. *Alaska Treadwell Gold Mining Company,* 187 U. S., 455, was distinguished from the *Pollock* case, and the decision justifying the dismissal of the bill by the court below was not put on the applicability of the Statute of 1867, but on the absence of a demand by the complainant on the directors to protect the corporation against the alleged illegal tax. Had he shown an effort to do so, even, the court says, "a different case would have been presented."

In our cases, as in all the others before the court in this hearing, the allegations of an effort to secure the action of the directors of the several companies to protect the complainants are not only alleged but particularly set forth.

IV.

In pursuance of the plan indicated for our argument therefore, we address ourselves at once to that which in most important aspects is the one thing necessary to decide at the outset of the inquiry.

The law, before it passed the Senate of the United States, was most vigorously and exhaustively dis-

cussed. It was urged by many constitutional lawyers there, and is our position here, that it levies a direct tax on incomes. If it should be so held by this court, there is an end of the argument, for if the tax be an income tax, it is not the less obnoxious to the constitutional objection that it is an unapportioned direct tax, because instead of being levied on all persons natural and artificial, having an income above a certain figure, as was the Law of 1894 adjudged invalid in the *Pollock* cases, it is limited to corporations (that is, a particular kind of artificial persons constituted by the various states entities with the rights of natural persons resident within the state), together with associations of natural persons, not corporations, pursuing the particular business of insurance, or having a capital stock represented by shares.

And the *Pollock* cases decided that a general tax on incomes derived from "any source whatever" is a direct tax and can not be levied unless apportioned among the states in proportion to their populations.

It is true that before summing up its conclusions at the final hearing of the *Pollock* case, the court declared that it had considered the act only in respect of the tax on income derived from real estate and from invested personal property, and, as the opinion declares, had not "commented on so much

of it as bears on gains or profits from business privileges or employments, in view of the instances in which taxation on business privileges or employments has assumed the guise of an excise tax, and been sustained as such."

But to the two conclusions which found: *First*, that taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes; and *Second*, that taxes on personal property or on the income of personal property are likewise direct taxes, the court added a *Third*: That as the tax in question, so far as it fell on the income of real estate and of personal property was a direct tax within the meaning of the Constitution and therefore unconstitutional and void because not apportioned according to representation; the entire law "*constituting* one entire scheme of taxation" was necessarily invalid.

Within the necessary effect of each of these conclusions falls the case which we are arguing.

In its application to a great multitude of corporations throughout the country, and especially and definitely in its application to the corporation involved in this case of *Smith* v. *The Northern Trust Company*, the Corporation Tax, if it be a tax on income, falls on income from both real estate and from invested personalty.

The bill to which the demurrer was sustained expressly sets forth that the Northern Trust Company may by law loan money on personal and real estate security; that it may execute trusts of every description; that in its trust capacity it is administering real and personal property of the aggregate value of many millions of dollars; that it derives an income from such sources, and that it holds in its own right real estate located in the City of Chicago of the value of more than one million dollars, from a part of which it receives income and rents of about nine thousand dollars per annum, and that it derives an income of more than fifty thousand dollars annually from its investments in interest-bearing bonds of cities, counties, public parks, and other municipal corporations, and that the Corporation Tax is a direct tax in respect of its real estate and personalty.

It has been suggested that even were the law to be held unconstitutional in its attempt to tax income from investments in real and personal property, it might be held valid as to all other, or some other income.

We submit that this position is untenable. As in the Income Tax Law of 1894, the provisions of the Corporation Tax Law of 1909 constitute one entire scheme of taxation. The taxation of income

arising from real estate and from invested personal property is in both laws a part of the warp and woof of that scheme. In neither case, it is apparent, would Congress have been willing to pass a law which should have exempted or taken no account of such income from real estate and personalty, while levying on, or measuring the tax by, the remaining income of all persons taxed in one case and of the selected persons taxed in the other.

The essential language which describes the income on which the tax is to be levied is nearly identical in the two acts. In that of 1894 the tax was expressly levied on

> "the gains, profits and income received in the preceding calendar year by every citizen of the United States * * * and every person residing therein, whether said gains, profits or income be derived from any kind of property, rents, interest, dividend or salaries, or from any profession, trade or employment or vocation * * * *or from any other source whatever.*"

In that of 1909:

> "Every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company * * * shall be subject to pay annually a * * * tax * * * equivalent to one per centum upon the entire net income * * * received by it *from all sources during such year,*" etc.

We fail to see any reason for holding as against

corporations, the law of 1909—if invalid so far as it affects the income from real estate and invested personalty—good in part and as affecting certain other kinds of income, which was not of equal force for holding as against all persons (corporations as well as others) the law of 1894, although invalid so far as it affected the income from real estate and invested personalty, good in part and as affecting such other kinds of income.

But this court, at the final hearing of the *Pollock* case, in cogent words rejected the argument in favor of such a holding as to the law of 1894, and in doing so cited and quoted with confirmatory approval the language of this court in *Pointdexter* v. *Greenhow*, 114 U. S., 270, and in *Spraigue* v. *Thomson*, 118 U. S., 90, and the language of the Supreme Judicial Court of Massachusetts, by the mouth of Chief Justice Shaw, in *Warren* v. *Charlestown*, 2 Gray, 84. It would serve no useful purpose to repeat that language herein. The statement in each case is an enunciation of the established rule that courts cannot, in order to establish the partial validity and effect of a law, confer upon it a partial and discriminating operation which they cannot say the Legislature would have desired and provided for in the absence of the invalid portion of the law.

Can it be even doubtful that Congress would have declined to pass the Corporation Tax Law of 1909 had the income from the real estate and invested personalty of all corporations been by its provisions exempted from the income on which the tax was to be computed? It even refused to heed the recommendation of the President who suggested the exclusion of national banks, whose income is practically all from invested personalty.

It is perhaps not too much to say that the chief arguments used for the passage of the law gained all their force from the fact that corporations in the opinion of many of its supporters were absorbing an undue proportion of the resources of the country in their holdings of real estate and in their accumulation of immense amounts of invested personal property.

To hold the tax valid as to other income of corporations but not as to the income from these factors in corporate wealth would be actually to effect the exact opposite of that which Congress desired. It would be to tax corporations so far as they are active and useful business bodies and exempt them so far as they are rich, idle, and grasping.

And yet if it be only doubtful even, whether Congress would have passed the law emasculated in the manner suggested, this court must, if it ad-

judges it invalid as to the income from real estate and invested personal property, declare it invalid altogether, for, in the language of Mr. Justice Mathews in *Pointdexter* v. *Greenhow;*

> "To hold otherwise would be to substitute for the law intended by the Legislature one they *may* never have been willing to enact."

Before we proceed to a discussion of what the Corporation Tax is levied on, and what is its proper designation, we call attention to the fact that in the case of the defendant corporation, the bill alleges that an income of over fifty thousand dollars is derived by the Northern Trust Company annually from municipal bonds, bonds the income of which the unanimous opinion of the court in the *Pollock* cases (as distinguished from its holding on all other contentions), decided could not be taxed by the Federal Government because such bonds were the instrumentalities of the state. We shall return to this consideration later and in another connection, but we stop to allude to it here to ask further, whether it can be conceived to have been even the intention of Congress to tax the incomes of all the corporations of the country, save and except that derived by its trust companies and banks and other financial corporations from municipal bonds. Setting aside the matters on which the court was divided in the *Pollock* case—the validity of the un-

apportioned federal taxation on the income of real estate and personalty—we have, if this Corporation Tax be a tax on incomes, in the attempted taxation of the income of state and municipal bonds a factor and component part of "one entire scheme of taxation," which factor and part an undivided court in the *Pollock* case found impossible and invalid.

V.

Thus we are brought in this main branch of our argument directly to the question: Is this Corporation Tax an income tax?

It is true the act imposing it does not so denominate it. Indeed, it is conceded at the outset that in its mere phraseology (but in its phraseology only) the first care of its framers and proponents was to negative the idea that the tax enacted was to be an income tax.

It was to be "a special excise tax"—if calling it so could make it so. It was not to be "one per centum upon the entire net income, etc." It was to be "equivalent to one per centum upon the entire net income, etc." It was not even to be a tax "on the carrying on or doing business by such corporation, etc.," but a tax "*with respect to* the carrying or doing business, etc."

The adoption of this last language from the opin-

ion of Mr. Justice Harlan in the *Spreckels* case (*Spreckels Sugar Refining Company* v. *McClain*, 192 U. S., 397, where it was entirely in place, to use it in a legislative act where it was emphatically out of place (for it is juridical, not legislative, phrasing), accentuates the foreboding of the authors of the law that it could not readily pass the tests to be applied by this tribunal. To secure this end they called the tax that which it was not—"an excise tax"—they resorted to what, with all respect, be it said, seems to us the trivial expedient of using the words "equivalent to," instead of the word "of"; and they used juridical in place of apt legislative language in the hope that by the use of these words alone they could, as it has been expressed, "attach this tax to the business rather than to permit it to be attached to the property."

We submit that the authors of the law, able and ingenious as they were, were attempting an impossibility. This court would not exercise the high prerogative of finding a tax levied by the Congress of the United States unconstitutional and void if phrased in one set of words, but, although exactly the same in substance and result, constitutional and valid if phrased in another. Such refinements and technicalities are not practices of great tribunals, least of all of this one. The Income Tax of 1894, ad-

judged void in the *Pollock* cases, would not have been held valid had it run, "There shall be assessed, levied, collected and paid annually, with respect to the carrying on of the business of receiving income, gains and profits, by every citizen of the United States, whether said gains, profits or income be derived from any kind of property, etc., * * * or from any other source whatever, a tax equivalent to two per centum on the amount so derived, etc." Not such are the methods of this court, which looks through all legal fictions and pretenses straight to the heart of the matter involved.

It will have no sympathy with an astuteness which plays fast and loose with language in legislation in the hope that by using one phrase a purpose can be accomplished constitutionally, which comes into collision with the Constitution, if another in substance and real effect identical, is used.

Citation of authority is not needed for so plain and patent a truth, but express authority of this court is not wanting to this very proposition.

In *Galveston, Harrisburg and San Antonio Railway Company et al.* v. *Texas*, 210 U. S., 217, in holding that the State of Texas could not impose a certain tax upon railway companies equal to one per centum of their gross receipts, Mr. Justice Holmes, in the opinion of the court, says:

"Neither the state courts nor the Legislatures" (and the same rule must apply to Congress) "by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

And again:

"This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

And he cites, in support of his language,

Stockard v. *Morgan*, 185 U. S., 27, and

Asbell v. *Kansas*, 209 U. S., 251.

Passing from mere phraseology to real substance, what is the Corporation Tax levied on? If not on incomes, on what does it fall? It has certainly all the *indicia* of an income tax.

As has been well said by another (Machen on The Federal Corporation Tax), *prima facie*, a tax is laid upon that in proportion to which its amount is measured; and where a tax may be laid on an intangible right or privilege, in proportion to the value of some other property, without being a tax on that property (as it is conceded that this court has held it may in some cases be: *Railroad Company* v. *Collector*, 100 U. S., 595; *Home Insurance Co.* v. *New*

York, 134 U. S., 594; *Plummer* v. *Coler*, 178 U. S., 115; *Delaware Railroad Tax*, 18 Wall., 206; *New York* v. *Roberts*, 171 U. S., 658), it is because the value of the property by which the tax is gauged is a reasonable measure of the value of the intangible right or privilege, or where the intangible right might be altogether taken away by the taxing government and may therefore be conceded on such conditions as that government pleases.

Neither of these conditions exist as to the law under discussion.

It cannot, we submit, properly be held or considered to be a license or privilege tax on the right to be or to do business as a corporation, for it is not within the power of Congress to deny or concede such powers to a corporation like the defendant corporation here (and like the great majority of those corporations which this tax affects), or to prescribe the conditions on which they may be exercised within the state creating it. We shall have occasion to discuss this proposition in another aspect in a subsequent branch of our argument, but we state it here, as a reason for its being impossible to hold this tax anything but an income tax on the ground that it is merely proportioned or measured by the income.

Nor despite the peculiar phraseology which calls

it a tax "with respect to the carrying on or doing business," can it be considered a tax on doing business at all. It is not proportioned to the amount of business done by the corporation or other association or company taxed, nor to the amount of income received from any such business, but to "the net income over and above five thousand dollars received by it *from all sources* during such year, exclusive of amounts received as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed." In the case of companies organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska, it is imposed on them whether they do any business or not. The net income which these companies derive may be entirely from real estate, or entirely from invested personalty, it may indeed be from the municipal bonds which, and the income from which, this court has unanimously declared Congress cannot tax. The companies may be doing no business—but be merely "incorporated gentlemen of leisure" (Vann, J., in *People* v. *Roberts*, 154 N. Y., 1), or they may be doing business at a loss, more than made up by their income from real estate or invested personalty before accumulated. But in

each case this tax of one per centum falls with the same force and directness on their income over five thousand dollars.

What is this but an income tax? And how does the expedient of calling it "A Special Excise Tax" alter or conceal its true character? And is it any less obnoxious to the objections to its constitutionality because it is levied on some citizens and persons (artificial and natural) over whom and whose business Congress has no visitatorial or regulatory power, rather than on *all* the citizens of the country, as was the Income Tax of 1894?

Unless these questions can be answered satisfactorily—in a sense different from that which seems to us the obvious one—this tax must fall as within the construction of the Constitution laid down in the *Pollock* case.

The case of *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S., 397, is especially relied on as an authority which will sustain this tax as an "Excise" tax and negative the proposition that it is an "Income" tax. We cannot so consider it. Its effect seems to us the opposite. The tax involved in the *Spreckels* case was imposed on the gross receipts in their business of *all* persons carrying on either of two specified occupations. It was therefore certainly an "Excise Tax." The court expressly held that

the tax being an excise tax on the particular occupations named, no part of the gross receipts made the measure of the excise not having a necessary connection with those occupations could be considered in fixing the amount of the tax, and reversed and remanded the case because they had been so considered.

The tax involved in the cases at bar, does not purport to be measured by the receipts in any particular business or in business at all. It is, like the Income Tax of 1894, measured by an income from "all sources." It does not fall on all persons engaged in any particular occupation or occupations. It falls on one peculiar kind of persons by virtue merely of their existence and their having an income, as the Income Tax of 1894 did on all citizens by virtue of their existence and income. It is neither in spirit nor letter within any holding in the *Spreckels* case.

VI.

To the conclusion that the Corporation Tax Law provides for an Income Tax and must therefore stand or fall by that description, our own opinion is that there is no admissible contradictory or alternative proposition.

As a tax on the income from real estate and in-

vested personal property owned by the corporations and the other associations subject to the tax, it cannot, because unapportioned, be sustained by this court, unless the court is prepared to depart from its decision in the *Pollock* cases. Of that possibility we shall take no further account, for nothing that we could say would render less remote the contingency nor add force to the arguments for adherence to it which are already in the minds of the court.

Whether or not the Government will concede that if the Corporation Tax is an Income Tax it falls within the ruling of the *Pollock* cases, we do not know.

Whether or not, if such a concession be made, it would ask the court to recede from anything laid down in the *Pollock* cases, we do not know.

We do know, however, that the Government does not concede that the Corporation Tax is in any sense an Income Tax, but holds fast to the theory that it is, as it terms itself, "A Special Excise Tax." We pass then as in pointing out in our bill the constitutional objections to the law we did, from our own view of its real nature to that taken by the Government, shifting the battle ground only that we may meet the defenders of the law on their own chosen field and with their own weapons.

In the further discussion of the questions involved, for the sake of the argument, and for the sake of the argument only, we shall eliminate from consideration the thesis of the truth of which we are really convinced, that the Corporation Tax is an Income Tax, and therefore a direct tax, and adopt the other, which we have indicated, we believe inadmissible; that it is, if not as it calls itself, "A Special Excise Tax," at least an indirect tax.

We do not care in this branch of the argument more than in the preceding one to haggle over the mere meaning and use of words. Therefore, we shall enter on no discussion of whether admitting this tax to be indirect and not an Income Tax, it is properly termed an "Excise Tax." We think it might be easy to show from the definitions of the word "Excise" as applied to governmental impositions, by legal and general lexicographers alike, from the famous unjustifiably prejudiced exposition of Dr. Johnson, to the present time, that the strictly proper use of the term "Excise" makes it refer only to a tax on commodities or on particular occupations, which this tax certainly is not.

But we do not see any good end to be attained by such a showing. Our faith is strong, as before indicated, that it will not be by names legislatively given, but by things legislatively done, that this

court will be governed in the disposition of these cases.

If Congress did not attempt to levy a direct income tax, it did attempt to levy an indirect privilege, license or franchise tax. By whatever name it may be called it falls within the class of indirect taxes which the Constitutional Convention in its finished work, lumped together as "duties, imposts, and excises."

We do not think it is necessary or useful in view of the language of the majority opinion of the court at the first hearing of the *Pollock* cases, 157 U. S., at page 557, and never withdrawn, to enter upon any discussion of whether there can be any tax levied by Congress which is not a direct tax nor included under the words "duties, imposts and excises."

The Chief Justice in that opinion, said:

> "Thus in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes and lays down two rules by which their imposition must be governed, namely, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.
>
> "The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of Section eight to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section.
>
> "And this view was expressed by Mr. Chief

Justice Chase in *The License Tax Cases*, 5 Wallace, 462-471, when he said: 'It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. Congress cannot tax exports and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited and thus only it reaches every subject and may be exercised at discretion.'

"And although there may have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

We may then in this branch of the argument build on the foundation that if the tax in question be not "a direct tax," it falls, if not within the strict definition of an "excise," yet within the terms generically used by the Constitution makers, "duties, imposts and excises," and is subject to the rule of uniformity.

But the essential question which then meets us again is not what is the proper name of this tax—which must be "uniform"—but On what is it levied? or For what is it to be paid?

Answers to these questions are necessary before we can properly discuss the question lying beyond: Has the rule of uniformity been followed in its imposition? And the one still farther on: If the rule

of uniformity has been thus observed, is the tax invalid because levied on and exacted for something which causes it to infringe on the rights reserved to the States under the Federal Constitution?

The questions "On what is it levied?" or "For what is it to be paid?" are, however, really identical on that hypothesis on which we are proceeding which eliminates the conception difficult to banish from the mind—that as this tax is directly proportioned to the income of the persons taxed it falls on that income.

But if we are to succeed in thus banishing this conception, we must do it by first, with whatever effort is necessary, accepting the proposition of the Government, as it has always been that of all the advocates and defenders of the tax, that the net income of the respective parties taxed has nothing to do with the matter, except as a *measure* for the amount of a discriminating *license or franchise* tax to be placed on them.

This was the position, it may be noted, taken in the ablest though not the longest arguments made in favor of the validity of the law in the Senate of the United States. Senator Daniel baldly stated the theory which we have indicated,—the only other theory which can be invoked with plausibility even, to withdraw this tax from the category of direct in-

come taxes. In opposing the practical exemption of holding corporations, which by the provision concerning deductions finally secured a place in the bill, he said, "An impression * * * that it is taxing property twice if a corporation holds stock in another corporation if both corporations are taxed with respect to the holding of such property * * * is a complete confusion of thought. If a holding corporation owns bonds or stocks, it does not by this proposition pay any tax on them at all as bonds or stocks. They are simply used as a yardstick by which the measure of the excise, which is in the nature of a license tax, shall fix the number of dollars for that license or privilege." Senator Root said: "It matters not from what source may come the income which is seized upon by the law as a measure for the value of the facility which is taxed."

It does not, we will admit, look very logical that Congress should nevertheless have allowed the deduction of the income from all corporation stocks owned by a holding company, from the "yardstick measure," but we must remember not only that logic is not always a distinguishing mark of legislative bodies, but also that we are now excluding only by hypothesis, the view that Congress, despite the theory of the framers and chief advocates of the law that phraseology could hide substance, intended to

pass another direct income tax law to enable this court to reconsider its conclusions in the *Pollock* cases.

Much more logical viewed in the light of its own theory is the ruling of the Department of Justice, despite its apparent injustice in effect, that the various issues of the bonds of the United States exempted from taxation by the laws which issued them, must yet be computed as within the sources of that income which is to be the "yardstick," with which to measure the "license," "franchise" or "excise" tax which the Corporation Tax is alleged to be.

But still, when the idea that the income, of which an aliquot percentage is to be taken in the license tax, is a mere measure is fully assimilated, the question recurs: For what privilege is this license tax to be taken?

As we are eliminating by hypothesis the possibility of this tax being one on property or income we must eliminate also the idea that it is a tax on the privilege of holding property. Certainly no one would attempt to make a distinction in nature between a tax on property and a tax on the privilege of holding property, or a distinction between a tax on income and a tax on the privilege of receiving income. To do so would be to contend that to make an

unapportioned Federal tax on real estate, on invested personal property or on municipal bonds valid, it is only necessary for Congress so to change the phraseology as to declare it a tax on the privilege of owning real estate, of owning invested personal property or of owning municipal bonds. This would be a *reductio ad absurdum*, not necessary to comment on.

In view then of the hypotheses eliminated, there are but two answers to the question, "For what privilege is this license tax to be taken?" possible to formulate. One is that it is for the privilege of doing business, not any especial or particular kind of business, but any business whatever. This of course implies further that selected apparently arbitrarily from all other persons and bodies whatever, corporations, joint stock companies and associations organized for profit and having a capital stock represented by shares, and insurance companies, shall alone be required to pay a license tax for the privilege of doing business, while all other persons and associations may do the same business without such an imposition.

The other possible answer is that this license tax is to be paid in the case of a corporation for the privilege of being a corporation and in the case of any of the other associations or companies men-

fore, on the privilege of *being* a corporation that the tax is laid, if it be a privilege or license tax.

It may be said—indeed, it has been said (Machen on Corporation Tax)—that the tax cannot be on the privilege of existing as a corporation, because it is applicable not only to corporations but to various unincorporated bodies.

The obvious answer to this is, that if it is a privilege tax at all, it is a privilege or license tax laid on different privileges. So far as corporations are concerned, it is laid on the privilege of being a corporation, and undoubtedly it was principally for the purpose of affecting corporations that the law was passed. But Congress added to that privilege to be taxed, the privilege of being a joint stock company organized for profit and having a capital stock represented by shares, the privilege of being an association organized for profit and having a capital stock represented by shares, and the privilege of being an insurance company. It is true that this was a somewhat heterogeneous collection, but we have before noted that the logical working out of the original idea of the tax seems to have been defective. It does not prevent the tax on a corporation from being a tax on the privilege of being a corporation, because the tax on a joint stock company is a tax on the privilege of being a joint stock company. Indeed, as we shall

hereafter point out more in detail, the privilege of being a joint stock company of the kind described in the law does not in some states differ more from the privilege of being a corporation than the privilege of being a corporation in one state differs from the privilege of being a corporation in another.

We shall assume, therefore, in the mere phrasing of our further argument, that the only plausible alternative to the holding that the Corporation Tax is a direct income tax on certain selected persons, is that in the case of a corporation it is "a privilege or license tax" on the right to be a corporation. We do this because it seems to us true, not from the necessity of the argument, for all that we shall suggest will apply, in substance, as well, if the tax is on the privilege of doing business as a corporation, as though it were on the privilege of existing as a corporation. Indeed, does not the franchise or charter granted by a state to exist as a corporation imply a right to do business?

VII.

Consider, then, first, on whom this privilege tax principally falls:

Corporations like the one involved in this case are creatures of the state under whose laws they are incorporated. They are artificial persons regulated

within that state, it is true, by the laws of the state which created them and which may impose such conditions on their existence as it pleases. So, too, may other states impose conditions on the exercise of their functions—practically on their existence—in such states. But to the Federal Government they are in the same relation as natural persons having the same rights of citizenship in the creating state. The United States has no regulatory or visitatorial powers over them which it does not have over all persons in its jurisdiction. And the same thing is true of insurance companies and joint stock or other associations of the nature described in the law.

Were authorities necessary for this proposition we could cite them in scores from the decisions of this court. We content ourselves with mentioning only:

Louisville C. & C. R. Co. v. *Letson*, 2 Howard, 497.

Marshall v. *Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

Ohio & M. R. Co. v. *Wheeler*, 1 Black, 286.

Bank of Augusta v. *Earle*, 13 Peters, 519.

St. Louis v. *Wiggins Ferry Co.*, 11 Wallace, 423.

San Bernardino County v. *Southern Pacific R. R. Co.*, 118 U. S., 417 (Opinion of Mr. Justice Field).

Pembina C. L. M. & M. Co. v. *Pennsylvania*, 125 U. S., 181.

C. C. & A. R. Co. v. *Mackey*, 142 U. S., 386.

Unless, then, the defenders of this tax are, as has been well said, prepared to go to the extent of asserting that Congress can levy at its discretion a tax upon all red headed men, or all blue eyed men, or both, under the guise of a privilege or license tax for being thus red headed or blue eyed; or, at the very least, can levy a tax on the privilege of such red headed or blue eyed men to do business in the United States, while leaving untouched by such taxation all other men doing the same business, this law must fail on their own theory.

And so some at least of its advocates have conceded and boldly avowed their belief in the hypothetical proposition. They have done this, acknowledging that such a tax would not be uniform between citizens throughout the United States nor between persons in the same states; admitting, too, that it would be an arbitrary classification of persons to be taxed, not justified ethically, as they contend this Corporation Tax is, but nevertheless constitutional and beyond the power of this court to interfere with or to declare invalid. The ground of this contention is that the unconstitutionality of a tax can not be declared unless it is shown that it infringes on the express words of the Constitution limiting the otherwise uncontrolled right of Congress to tax.

The uniformity required in the levying of indirect

taxes, they say, is a geographical, not an inherent, uniformity and means only that the tax must be operative in all the states alike.

We shall briefly allude to this question of the nature of the expressly required uniformity in another connection, but for the purposes of the argument at this point, we admit that such has been the decision of this court as to the meaning of the express limitation of uniformity "throughout the United States" imposed upon indirect taxes by the Constitution.

But we are unprepared to admit the further necessary premise of the argument of the defenders of the tax that the unconstitutionality of a tax must absolutely be found in the express words of the Constitution.

We have alleged in our bill, as before noted, a conclusion of law that uniformity is, if not expressly, yet "implicitly required by the Constitution of the United States and the principles of free government as to all taxes so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax," and for that proposition we strenuously contend. On it we are certainly not foreclosed by any utterance of this court, which, in the case most strongly insisted on as establishing forever and beyond all controversy that

the express uniformity required by the Constitution is only a geographical one (*Knowlton* v. *Moore*, 178 U. S., 41), said:

> "It may be doubted by some, aside from express constitutional restrictions whether the taxation by Congress of the property of one person accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, *would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.* On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since as we understand the law, we are clearly of the opinion that it does not sustain the construction which was placed on it by the court below."

Again:

> "If a case should ever arise where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious."

We contend that the time spoken of by Mr. Justice White has now come; that the tax under discussion is "arbitrary and confiscatory," and that in-

herent and fundamental principles for the protection of the individual should be applied.

It is not the exercise of an allowed legislative discretion raising merely a question of abstract justice and expediency that selects from some millions of persons engaged in myriads of differing mercantile, manufacturing, agricultural, fishing, mining, financial and other industries, several hundred thousand only, whether because of their blue eyes or red hair or because they are in the purview of the state which created them alone, artificial rather than natural persons, and subjects them to a privilege or license tax either for the right of existing or for the right of carrying on their various and varied occupations.

It is so much a matter of common knowledge that it is not out of place in this argument to allude to it, that there are 400,000 corporations in this country and that not one per cent, with the exception of the railroads, are doing a business more public with reference to the interests of the United States than the millions of men in and out of partnerships, engaged in the purely private business activities of the country. The trade or business that the majority of these corporations carry on reaches down to the local mercantile business of small cities and towns where they are competing perhaps with

powerful individual or partnership rivals, at whose mercy these corporations who have themselves no counter-balancing advantages against such rivals, will be by the operation of this law placed, if it should be held valid.

We do not urge these considerations with any reserved thought that they can affect the judges of this court if it is to be held that they are matters merely of expediency and exact justice, to be therefore properly addressed to Congress alone; but because we believe them to be proof of such gross discrimination and arbitrary exercise of power in taxation as in the striking language of Mr. Justice White for this court, "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

We shall not press the argument on this point further. It is of a nature that will appeal to this court at once and spontaneously or not at all. If we are wrong in our conception of the power of this court or of the exceptionally arbitrary discriminations of this tax, the court will not be moved by our insistence; if we are right, the court will recognize it and prevent by the exercise of its highest prerogative and duty a great injustice to the citizens who have associated themselves together in corporations and joint stock companies.

VIII.

We come now to the express uniformity "throughout the United States" required by the Constitution in duties, imposts and excises.

In our bill (of which there is an abstract in the statement prefixed to this argument), we have in Paragraph fifteen under alphabetical arrangement set forth certain particulars as we conceive them, in which this tax does not conform to the rule of uniformity. As to those which are listed under subparagraphs A, B, C, D, E, F, and H, we will concede that they lose much of that part of their force which rests upon the *express* uniformity required by Section 8 of Article 1, of the Constitution, if that uniformity is not an inherent but a mere geographical uniformity. That it is a mere geographical uniformity we must also concede was held in *Knowlton* v. *Moore, supra*, and in *Patton* v. *Brady*, 184 U. S., 608.

On that proposition therefore we shall only presume to say that in the *Pollock* cases, in which the tax under discussion bears much more resemblance to the Corporation Tax than those discussed in *Knowlton* v. *Moore* and *Patton* v. *Brady*, four members of this court, as shown by the opinion on the first hearing, held that the tax violated the uniformity required, and Mr. Justice Field's concurring

opinion declared that "the correct meaning of the provisions requiring duties, imposts and excises to be uniform throughout the United States" is that the law imposing them should have an equal and uniform application in every part of the Union, and that "if there were any doubt as to the intention of the states to make the grant of the right to impose indirect taxes subject to the condition that such taxes shall be in all respects uniform and impartial, that doubt should be resolved in the interest of justice in favor of the taxpayers."

And because of the exemptions which were little different in principle in the Income Tax Law of 1894 from those provided for in the Corporation Tax Law of 1909, he announced his conclusion that the part of the Income Tax Law which levied duties, imposts and excises was void in not providing for the uniformity required by the Constitution in such cases. As we have said three other justices of the eight then sitting agreed with him in that conclusion and in consequence the precise question (which became an academic one in the subsequent hearing of the case) was not decided at either hearing.

But in each of the sub-paragraphs of our bill referred to are allegations concerning the provisions of the law which no holding of this court has deprived of whatever force they may have to the

minds of its members in connection with the considerations we have already urged against the power of Congress under the *implicit* requirements of our Constitution and system of government, to make arbitrary, unreasonable and grossly discriminating classifications in the levying of taxes.

But farther;—on the strictest construction of the constitutional limitation to uniformity in excise and other indirect taxes we contend that we have pointed out in sub-paragraph G of Section 15 of our bill matters which show that this Corporation Tax does not conform to it. The tax is no more uniform geographically between the states than inherently between individuals, partnerships and corporations within the respective states.

The tax, so far as a corporation is affected, is one on the right or privilege of existing as a corporation; so far as a joint stock company is concerned, of existing as a joint stock company; so far as an insurance company is concerned, of existing as an insurance company;—or at the very best that can be said of it on the right or privilege to do business as a corporation, a joint stock company or an insurance company respectively.

But the right or privilege of existing as a corporation or as a joint stock company or as an in-

surance company and the right or privilege of doing business as any one of them, differs widely in its nature among the different states. These rights and privileges are very different things in New Jersey, for example, from what they are in California.

For illustration: In the executive message which first proposed a corporation tax to the Senate and in much of the discussion in that body it was assumed that the privilege of existing or doing business as an artificial entity included a right of freedom from individual liability by those who owned stock. So it does in New Jersey for example in the case of most corporations at least. But no such freedom from liability is connected with the right or privilege of being or doing business as a corporation in California, where by the constitution of the state, each stockholder of a corporation is made individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. (Constitution of California, Article XII, Sec. 3.) It is not only alleged in our bill—it is within the judicial knowledge of the court (for the Supreme Court on appeals from the federal court takes judicial notice of the laws of all the states—(*Hanley*

v. *Donoghue*, 116 U. S., 1; *New York Fourth National Bank* v. *Francklyn*, 120 U. S., 747; *Case* v. *Kelly*, 133 U. S., 21; *Mills* v. *Green*, 159 U. S., 651), that the rights, duties and privileges and obligations of corporate existence differ so widely in different states that this Corporation Tax is the taxation in different states of entirely different things by accident more than design having the same name. The word "Corporation" has no more the same meaning in California that it has in New Jersey than it has in England, where it is understood to mean a municipal governing body.

What is this but a want of geographical uniformity? Words can hardly make it plainer.

The same propositions are emphatically true of insurance companies and of joint stock companies in the various states. They are created, supervised and regulated by and under entirely different laws in different states. The right or privilege therefore of being a joint stock company and the right or privilege to do business as a joint stock company is an entirely different right or privilege in one state from that which it is in another.

In some states joint stock companies are not, we think, provided for by statute at all. In such states, what is a joint stock com-

pany? In the federal law the term certainly has no specific meaning. Is there a common law definition of it? If so, it is, in those states, the right or privilege of being such a joint stock company as has a common law organization that has to be paid for by this tax. But in other states it is, by statute, necessary to the legal existence of a joint stock company that certain documents be filed in a public office. Failure to file them leaves the company a mere partnership. In other states the same form of organization constitutes a joint stock company without any filing of papers. Thus, identical organizations would constitute in one state joint stock companies subject to the tax and in another state mere partnerships not taxed. Again, where is the geographical uniformity? It is violated in as plain and obvious a manner as the framers of the Constitution could ever have feared it might be when establishing the limitation.

It will not do to say that such organizations as by the force of statute law are left partnerships because of failure to comply with filing requirements, will fall within the description of "associations organized for profit and having a capital stock represented by shares," for the "shares" will be shares in a partnership in no wise differing from those duplicate originals of a partnership agreement which define

and specify the respective interests of the partners in the common fund or capital of the partnership, and we have not heard any claim and do not believe that such a one will be made that the intent of Congress covers partnerships, although the law does not expressly qualify the term "shares" with a limitation that they must be transferable.

And to illustrate the general obscurity of the law, we may ask what sort of an "association" or combination of people "organized for profit and having a capital stock" can there be which is not a corporation, a joint stock company or a partnership?

The laws which regulate the business and duties and rights and very existence of insurance companies, of banks and trust companies (like the Northern Trust Company), and of their stockholders, vary so much in the different states that it would take a volume to enumerate the differences. Does the tax on the right or privilege of being an insurance company, or bank, or trust company, or of doing business as an insurance company, bank, or trust company, fall on the *same* right or privilege in these different states? Is there uniformity in such a tax "throughout the United States," even if we give those words the strictest geographical meaning? These questions admit to our minds only of a nega-

tive answer. If that be the true answer, this tax must fall, even if it be truly an "excise" tax and "indirect."

Before we leave this subject of geographical uniformity we wish to allude to some alleged significant decisions of this tribunal which have not been officially reported and the statement of which, therefore, as made by an eminent Senator and constitutional lawyer, we have had no means of verifying prior to the printing of this argument. We use the matter, therefore, in no sense as authority, but only as illustration.

The Senator had made the extreme declaration to which we have before alluded and which we dispute, that Congress could validly tax all red headed men engaged in a given line of business, if the tax fell upon every red headed man in Massachusetts as well as in Mississippi and in Texas and in all other states.

He was asked:

> "Can the general Government tax the cotton of the south and leave the wheat of the western farmer untaxed?"

To which he replied:

> "Congress did once levy a cotton tax and it was attacked in the courts. The trial Judge held the law constitutional and the case was appealed to the Supreme Court of the United States which then consisted, I believe, of only eight members, there being a vacancy, as I re-

call, in the Chief Ju-ticeship. The question was argued and re-argued and probably argued a third time in that tribunal. The judgment below was affirmed without any opinion by a divided court, four of the Judges holding the law unconstitutional and four holding it constitutional. The four who held it unconstitutional did so, as I have always understood, upon the ground that the court must know judicially that cotton could not be grown in all the states and therefore that the tax on it could not be uniform. I have always regretted that the opinions in that case have never been published. The Senator's inquiry suggests a very pertinent consideration. *I do not myself believe that Congress has the power to levy a tax which the court can judicially know is incapable of uniform operation.* I do not hesitate to say that if that cotton tax had been levied at any time except in a period of great exasperation and sectional prejudice the court would have unanimously held it void. I must not forget to pay Congress the compliment to say that after the argument of that case, Congress had the good sense to repeal the Cotton Tax Law. That is the reason it was never finally and judicially tried out to a conclusion."

We agree with the learned and distinguished lawyer, whose words these are, that Congress has no power to levy a tax which this court can judicially know is incapable of uniform application. Such a tax is the one under discussion. The court not only can, but must, judicially know, if this tax be an excise tax on privileges or rights, that inasmuch as it falls on rights and privileges radically and inherently different in the different states, it is incapable of even geographically uniform application.

IX.

We pass now to another branch of our argument.

It is upon the objection to the tax specifically set forth in the sixteenth paragraph of our bill that if it be an excise tax—a franchise privilege tax—whether or not it be held uniform throughout the United States within the meaning and intent of the Constitution, it is in conflict with the Constitution of the United States because the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the states to grant franchises of corporate capacity and the value and purpose of such franchises and privileges which the states have full power to grant,—and because the tax is, both generally in its effect upon all the states and particularly in its effect on the defendant corporation and others like it, an attempted unconstitutional interference with instrumentalities of the states.

This objection to the law is one which we should deem, even in the absence of all others, controlling and decisive, and it is from no want of a sense of its importance and weight that we shall content ourselves here with a very concise and unelaborated

argument to sustain it in its widest and most fundamental aspect. But we know that it will receive from other counsel before the court the comprehensive and detailed discussion which it deserves, and we do not desire to duplicate and repeat unnecessarily matters which are thus sure to be fully and exhaustively treated by others.

The objection reduced to its lowest terms may be said to be this:

The power to tax involves the power to destroy, as the often repeated utterance of Chief Justice Marshall in *McCulloch* v. *Maryland* asserted. The power of creating corporations is a reserved right of the states. It is practically unlimited in the states. As this court said in *Briscoe* v. *The Bank of Kentucky*, 11 Peters, 257, p. 317:

> "A state may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty."

But if Congress, by taxing, can destroy the right or privilege of being a corporation, it infringes on the power of the state to create corporations.

And here, for the first time in our argument, we think that the question we have before discussed, whether this Corporation Tax is placed on the privilege of being or existing as a corporation or on

the privilege of doing business as a corporation, becomes, although not vital, of some importance.

For it has been urged by others and may be urged by the Attorney General here that a doubt might exist whether a federal tax could be laid upon the charter of a corporation granted by a state, which tax must be paid *before* that corporation could go into existence, but that such doubt does not exist about the tax under discussion because it is a tax levied upon the *business* of such a corporation *after* it goes into operation and is to be collected under penalty, and not by the forfeiture of its charter.

In view of the consideration that if the tax is placed on the privilege of doing any business as a corporation, it is placed on the privilege which is in the last analysis all that the charter is granted for and means, the distinction seems to us to be too fine to be vital even in this phase of the argument; but even more clearly does the fact that the tax is not made a condition precedent to the mere granting of the charter or incorporation right appear immaterial, if this tax is one not on the privilege or right of *doing business* as a corporation, but upon the very right or privilege of *being* a corporation. That this is the true nature of the tax, considerations which we have hereinbefore mentioned force us to believe. And this view is further strength-

ened by the fact that those attributes of corporations which it is claimed render them, rather than natural persons, proper objects of this discriminating tax, privileges which it is said should be paid for, namely, persistence in existence and exemption of stockholders from individual liability (which latter privilege, however, as we have before remarked, does not always exist) are inherent characteristics of the franchises granted by the state, elements in the very existence of the corporations, and no part of the business which they conduct.

If the tax is thus on the very existence of a corporation and the right to tax involves the right to destroy, it can make no difference as to its constitutionality whether it is placed on the right of the state to grant the franchise or on the franchise when granted, nor whether its payment is a "condition precedent" or a "condition subsequent."

We are well aware that an argument from the famous and somewhat epigrammatic utterance of Chief Justice Marshall, which has been quoted, may easily be pressed too far. The force of the reasoning on this point of Mr. Justice White in his opinion in *Knoulton* v. *Moore* (*supra*), and of other members of the court in the cases that he therein cites, can be denied by no reasonable man. "If a lawful tax can be defeated," he says, "because the power which

is manifested by its imposition, may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful and therefore no taxation whatever could be levied. Under our constitutional system both the national and the state governments moving in their respective orbits have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

And so, applying this thesis to a tax *not* "on the right to regulate the devolution of property on death," but "on the transmission or receipt" to and by the heir or devisee, the opinion rejects the argument against such a tax that "wherever a right is subject to exclusive regulation by either the Government of the United States on the one hand, or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate," declaring rightly that such an argument might be applied to the right to receive conveyances, mortgages, leases, pledges and indeed to the right to all property and the contracts which arise from its ownership (since they, too, are subject to state

regulation exclusive in its nature), as well as to the right to inherit, or receive by legacy, and thus the authority of the National Government to tax almost every subject of direct and many acknowledged objects of indirect taxation would be excluded.

And in accordance with the analogous doctrine that the power residing in a state to regulate (or, indeed, prohibit) a given business, does not make unconstitutional an act of Congress imposing a tax on carrying it on, the License Tax cases (5 Wallace, 462), were decided.

But neither *Knowlton* v. *Moore* nor the License Tax cases nor the kindred cases cited in the opinion in *Knowlton* v. *Moore,* are like the cases at bar. It is not the taxation of some business or property right which the states have the power to regulate and control that is objected to in this case. It is, on the other hand, a tax on the very right or privilege of existing at all, a very different thing. Such a tax on the privilege or right of existing is tantamount, it seems to us, to a tax on the right to create such an existence, and to fall within the other language of the opinion in *Knowlton* v. *Moore,* which declares that:

> *"The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which*

may be lawfully embraced therein, even although it happens in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."

We can not formulate to ourselves a more apt statement to apply to the Corporation Tax. Except for its requirement of publicity in the returns (which the court might not find so involved in the general intent and scheme of the law that it could not be adjudged unconstitutional without overthrowing the entire tax), the burdens of this particular tax law might not be considered intolerable, but it *is* intolerable to any believer in the reserved rights of the states that a power to destroy the privilege of existing as a legal entity granted by a state in the exercise of an exclusive right to do so, should reside in Congress.

Not such was the holding in the cases before referred to, cited in the opinion in *Knowlton* v. *Moore*.

The case of *Veazie Bank* v. *Fenno*, 8 Wallace, 533, may be considered the nearest in point to the contrary contention. But in that case it was plainly the exercise of one business only, which was allowed to the bank by the franchise creating it—that of circulating notes to pass as money—on which the tax fell, and that one a business which was a function in itself allowed the Federal Government.

This particular right or privilege, therefore, as has been well pointed elsewhere by one of the counsel in one of the cases now before the court, was subordinate to powers expressly conferred on Congress to provide a currency for the whole country by appropriate legislation. Under these circumstances it was more significant that two Justices dissented from the judgment affirming the validity of the tax on the ground that it affected the power of the state to create corporations, than that the Chief Justice, in voicing for the majority of the court the reasons for their decision, should have added to the sufficient ground of the powers of Congress over the currency, and to the statement that the tax was one not on any franchise of the bank but on property created or contracts made by the bank, a further statement that it could not "be admitted that franchises granted by a state are necessarily exempt from taxation, for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property."

Aside from the fact that this is a dictum only of the Chief Justice, it bears no such construction as the Government may be tempted to put upon it. That by "franchises," Chief Justice Chase meant

and meant only, particular and specific "franchises" or branches of private business allowed by state law to state created corporations, is shown not only by the whole tenor of the opinion, but by the fact that in the argument for the Government, it was only claimed that the tax was "an excise or duty on a branch of business" and that the power to tax included the power "to make taxation burdensome or even destructive *to particular branches of business*" —a proposition which we certainly do not dispute.

Our case falls rather within the general language of Mr. Justice Bradley speaking indeed of the attempt of a state to tax franchises granted by the United States:

> "The power conferred emanates from and is a portion of the power of the Government that confers it. To tax it is not only derogatory to the dignity but subversive of the powers of the Government and repugnant to its paramount sovereignty."
>
> *California* v. *Central Pacific R. R. Co.*, 127 U. S., 1.

For he further said in the same case:

> "No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise*";

and this court has also said and repeated:—

> *Collector* v. *Day*, 11 Wallace, 113;
>
> *Van Brocklin* v. *Tennessee*, 117 U. S., at page 178; and
>
> *Pollock* v. *Trust Co.*, 157 U. S., at page 584:

> "The general Government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme, but the states within the limits of their powers not granted or in the language of the tenth amendment, 'reserved,' are as independent of the general Government as that Government within its sphere is independent of the states."

But whatever may be said or thought of the right of Congress to tax a franchise or the privileges under a franchise granted by a state, either to exist or to do business, and whatever may be the extent of that right of Congress or its limitations—on one thing there is not and never has been doubt or difference. Congress can no more tax the public instrumentalities of the state than can the states tax such instrumentalities of the federal government.

This court said in *Ambrosini* v. *The United States*, 187 U. S., 1, that the law of self-preservation exempts any and all means and instrumentalities of state government from federal taxation.

The same doctrine explicitly declared—sometimes applied to attempts of the states to tax the instrumentalities of the federal government and sometimes to attempts of the federal government to tax the instrumentalities of the states—runs through the decisions of so many cases that to attempt to

make a catena of them is useless. It is the settled and recognized law of the land. A few of such cases may be cited:

McCullough v. *Maryland,* 4 Wheaton, 316.

Collector v. *Day,* 11 Wallace, 113.

United States v. *Baltimore and Ohio Railroad Co.,* 17 Wallace, 322.

Railroad Company v. *Peniston,* 18 Wallace, 5.

California v. *Central Pacific R. R. Co.,* 127 U. S., 1.

Ambrosini v. *United States,* 187 U. S., 1.

The Corporation Tax, as attested by all the arguments of its advocates; by the common knowledge that without the inclusion of the corporations which furnish transportation, water, light, intelligence-transmission, or perform other public or semi-public functions, the revenue to be expected from the tax would be relatively insignificant; and by the internal evidence of its provisions for publicity which in the case of merely private business enterprises can find no plausible pretext of justification; was perhaps framed more for the purpose of falling on public service corporations than on any others.

The inclusion of these corporations within the operation of the law is (as we have said is also the case as to the income of corporations from real

estate and invested personalty) part of the warp and woof of the law, "constituting one entire scheme of taxation." If these corporations cannot be constitutionally taxed under it therefore, we submit the "entire scheme" must fail, and the law as a whole be declared invalid on the doctrine declared in the *Pollock* cases, and referred to in the first branch of this argument.

And what are these public service corporations but instrumentalities of the state?

They certainly are not the recipients of mere private privileges either of existing or doing business, and yet it is on the assumption that such is the character of the privileges granted to corporations by the state that the argument for the right of Congress to tax them rests. It is not necessary to advance any debatable theories or to discuss the propriety or advisability of a more specific and complete public ownership of these public utilities to negative the idea that when they exist in private hands, as the great majority of them do to-day, they are not nevertheless so far impressed with a public character and function that both by its grants to them and its demands from them the state creating them has made them and treats them as its agencies and instrumentalities to perform public services.

The most ardent individualist does not now deny that to them are given a part of the power of the state,—some of the attributes of its sovereignty which it can control at all times and can in many cases and under certain contingencies recall. That the function of a water company supplying water to a village community is a governmental function was distinctly asserted for example (and the example is only one of scores that could be cited) in *Rogers Park Water Company* v. *Fergus*, 180 U. S., 624. In the similar cases decided at the same time of *Freeport Water Company* v. *Freeport City*, 180 U. S., 587, and *Danville Water Company* v. *Danville City*, 180 U. S., 619, it was admitted by both majority and minority opinions in a discussion of the question unnecessary to go into here of the right of a municipality to make an irrevocable alienation of such a governmental function, that for Illinois at least the Supreme Court of that state seemed to have adopted a theory which if followed would prohibit such an alienation. We allude to these cases only to show how undisputed is the doctrine that these public service corporations are exercising, under grant of the state, governmental functions of the state.

But certainly no citation of authority is really necessary for this. Multitudes of these corporations, including practically all the intra-state as well as

inter-state traction or railroad companies, are given some right of condemnation under the doctrine of eminent domain. He certainly would be a bold man who would deny that that power was a grant of governmental function to an agent or instrumentality of the state. Under the principle of eminent domain every man holds his property subject to the supreme right of the sovereign to take it. But it is the right of the sovereign and of no one else. The state is the sovereign in our system by which this very highest power of government is often used to take from a man his homestead or his farm without his consent. But the state uses in doing it its instrumentalities and agencies which, in the form of public service corporations, exercise the power of condemnation given them, leaving to the courts in effect only the determination of the compensation. The right of the party whose property is taken for public use to compensation is an express constitutional one, and not a part of the common law doctrine of eminent domain. It is not the courts, it is the state through the corporation to which it has granted the power "to take private property for public use without the owner's consent," that exercises this sovereign power of eminent domain. Are not then the corporations that exercise it instrumentalities and agencies of the

state in the strictest and most precise meaning of those words?

We submit that a federal tax can neither be laid on the right of such corporations to exist nor on their right to do a public business. Truly in such a case the power to tax *is* the power to destroy the means which the sovereign state in the plenitude of its power has deemed the best instrumentalities through which to supply to its citizens the very necessaries of life—water, light, transportation and information. The words of this court in *Veazie Bank* v. *Fenno* come back to us naturally for repetition;

> *"The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."*

But if the "license or privilege" tax—that this Corporation Tax is claimed to be—cannot be validly placed on these public service corporations, we submit that it cannot be placed on any, for the inclusion by the law of public service corporations is an evident part of the intent under which the law was passed as "an entire scheme of taxation."

X.

Even were the law not to fail as a whole because of its inclusion of public service corporations as we strenuously insist that it must, yet the tax would lack validity against the defendant corporation in the particular case which we are arguing and against all similar corporations, made by the law of the state creating them public agencies and instrumentalities of the state in a form analogous to, although differing from, that which is the characteristic of public service corporations.

Our bill alleges that the Northern Trust Company, the principal defendant, has, among other powers granted to it by the State of Illinois,

1. That of receiving an appointment by any court of competent jurisdiction in the State of Illinois as trustee, receiver, assignee, guardian, conservator or administrator.

2. That of so becoming under order of court the depositary of funds held by such officers as to discharge those officers from further care or responsibility for said funds.

3. That of so becoming such a depositary with the effect of reducing or dispensing with the public bonds of said officers.

The bill also alleges that because of these semi-public functions which it is authorized to perform

the Northern Trust Company is held to very strict reports to and relations with the State of Illinois, and has been obliged to deposit with an officer of the state government $200,000 in bonds of the United States or other approved securities.

The bill also alleges that the defendant, the Northern Trust Company, as a matter of fact has, under its charter-authority and by the provisions of state legislation been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases, and in its trust capacity under such appointments now holds and is administering real and personal property of the aggregate value of many millions of dollars; and that it receives a considerable and valuable income from its frequent appointment by the courts of Illinois as trustee, receiver, assignee, guardian, conservator, executor or administrator, and from the orders of courts of competent jurisdiction in Illinois by which receivers, executors, administrators, conservators, guardians, assignees and other trustees are required or are authorized voluntarily to deposit the moneys in their hands as such officers or trustees, with the said defendant corporation.

It is an agency through which to adopt language from *U. S.* v. *Baltimore & Ohio R. R. Co.* (*supra*).

"The legislative, executive and judicial de-

partments of the state administer their own affairs in their own manner.

"This carries with it an exemption of these agencies and instruments from the taxing power of the federal government. If they may be taxed lightly they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted."

We submit without further argument that the allegations of fact above recited justify the further allegation of law made in paragraph seventeen of our bill that in the case of the Northern Trust Company, "in a peculiar and especial sense, the Corporation Tax is an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers."

Moreover, the allegations of the bill show that the Northern Trust Company "owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations of the value of not less than one million four hundred thousand dollars and that all of the cities, counties, parks and municipalities whose bonds are so held by said Trust Company are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states," and that it derives an income of more than $50,000 annually from these bonds.

On such bonds or on their income an undivided court in the *Pollock* cases (see Mr. Justice White's dissenting opinion at the first hearing, 157 U. S., 652), held that no federal tax *direct or indirect for any purpose whatever* can be imposed, because these bonds are the agencies and instrumentalities of the state governments. Nothing can be plainer than this holding or than the doctrine of the cases cited in the opinion of the court to sustain it. It seems to us that in substance and essence they apply whether the income be considered the thing taxed or the measure by which the tax is gauged.

Yet, as the bill alleges, the defendants intend, despite the protest of the complainant, to pay as this Corporation Tax, one per cent of the net income of the Company, including its income from municipal bonds.

That an injunction should have been granted by the Circuit Court against its doing so, we submit with confidence.

And with this proposition we purpose to close this argument, leaving to the court without further discussion from us the allegations of our bill in Paragraphs 19, 20 and 21, which call in question the retrospective nature of the tax as to income accruing before August 5, 1909, and the much criticized and

bitterly unjust provisions of the law which absolutely require publicity in matters which affect no public interest and subject to the discretion of the executive the divulging of more intimate and detailed information still—when such information has been obtained by inquisitorial and summary processes. These elements of the law, however inexpedient and ill-advised, might by themselves perhaps be upheld as within the discretion of Congress as a means of enforcing the tax, if in its essential substance it should be held valid or they might be overthrown without involving what we have designated as the warp and woof of the statute. We do not doubt however that they will receive full attention in these aspects from other counsel before the court. We have endeavored only to make plain our reasons based on fundamental principles for believing the entire enactment invalid and void, and we leave our contentions in the hands of the court, knowing that whatever its duty may seem to its members to be, it will be wisely and courageously done.

EDWARD OSGOOD BROWN,
Of Counsel for Appellant.

GEORGE PACKARD and
VINCENT J. WALSH,
Also of Counsel.

PECKHAM, BROWN, PACKARD & WALSH,
Solicitors for Complainant.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

No. 753.

FRED W. SMITH,
Appellant,

vs.

THE NORTHERN TRUST COMPANY AND OTHERS,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the Circuit Court of the United States for the Northern District of Illinois from a decree of that court sustaining a general demurrer to a bill in equity filed by the complainant and dismissing the bill at complainant's costs.

The appeal was taken direct to this court because the constitutionality of an act of Congress is involved. Except a possible question of jurisdiction, settled, as we understand, by previous decisions of this court, there is indeed no other matter involved

in the appeal than the constitutionality of Section thirty-eight of the Act of Congress entitled, "An Act to Provide Revenue, Equalize Duties and Encourage Industries of the United States and for Other Purposes," approved August 5, 1909, and commonly known as "The Corporation Tax Law" of the United States.

The section is annexed as an appendix to this brief.

The bill alleges in detail and in apt, artificial language that the complainant, Fred W. Smith, is a resident and citizen of Illinois and the owner and registered holder of one hundred and forty shares (of the par value of fourteen thousand dollars) of the stock of the principal defendant, the Northern Trust Company, a corporation organized and existing under various acts of the General Assembly of Illinois; that he is informed and believes that the said Northern Trust Company and its directors, whom he makes defendants to the bill, intend voluntarily to make a return to the Collector of Internal Revenue for the First District of Illinois, of the net income of the Northern Trust Company, and of the other matters required to be stated in relation to its business for 1909, within the time required by the act for such return, and to pay, within the time required by the act for such payment, the tax of one per centum on its entire net income over five thousand dollars, provided for by

said act. This tax would, according to the allegations of the bill, be more than two thousand dollars, the net income of the defendant corporation for the year 1909 being over $250,000.

The complainant alleges that the provisions of said Section 38 of the Act of August 5, 1909, are unconstitutional, null and void and furnish no justification for the payment of said tax or for the return as contemplated and intended by the defendants, and that he has requested the defendant company and its directors to refuse to pay the tax for said company or to make the return, and to contest the constitutionality of the law, but that they have refused his request; and that as the directors of said Northern Trust Company own more than a majority of the entire capital stock of said company, no effort on the part of the complainant looking to action of the stockholders to prevent the return or payment could be effectual.

The payment of the tax, the complainant alleges, would be a misapplication or diversion of the funds of the defendant corporation by its directors to the injury of the complainant, and a violation of the fiduciary duties of said directors to the complainant and the other stockholders.

Wherefore, the complainant asks an injunction against the defendants voluntarily making either

return or payment under the law in question, which he asks may be adjudged unconstitutional, null and void.

The bill in its successive paragraphs, from the first to the seventh, describes the nature, the business and the property of the defendant the Northern Trust Company; showing that its capital stock, surplus and accumulated profits exceed $3,500,000; that it is by law authorized to do a general banking business and to take and execute trusts, and that it may, by express statute of the State of Illinois, be appointed by any court of competent jurisdiction in Illinois, trustee, receiver, assignee, guardian, conservator, executor or administrator; and that any such court, also by express statute, may order any such officer of which it has jurisdiction to deposit any funds in his hands, as such officer, with the said Northern Trust Company, and thereafter the officer shall be relieved from further responsibility for said funds.

To qualify itself to act under these laws the complainant was obliged to and did make certain deposits with the Auditor of Public Accounts of the State of Illinois, and to make certain reports of its affairs and business to said Auditor.

Thus, the complainant alleges, the Northern Trust Company

"was made by the effect of the statutes of Illi-

> nois and its compliance therewith, in an especial and peculiar sense an instrumentality and a part of the governmental machinery of the State of Illinois,''

and has as a matter of fact been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases, and in its trust capacity under such appointments, now holds, and is administering real and personal property of the aggregate value of many millions of dollars.

It is also alleged that the said Northern Trust Company owns and holds in its own right real estate in Chicago of the value of more than one million dollars, part of which is leased out to a tenant for the annual rental of nine thousand dollars.

That said defendant Trust Company

> ''owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations of the value of not less than one million four hundred thousand dollars and that all of the cities, counties, parks and municipalities whose bonds are so held by the Trust Company are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states,''

and that said defendant Trust Company derives nine thousand dollars of its income annually from the rents of its absolutely owned real estate, more than fifty thousand dollars annually from its investments in interest bearing bonds of municipal corporations,

and a considerable and valuable income from its frequent appointment by the courts as Trustee, Receiver, Assignee, Guardian, Conservator, Executor, Administrator, and from the orders made by courts requiring or allowing such officers to deposit moneys with it.

The bill also alleges that the defendant, the Northern Trust Company, has held and is executing numerous trusts, committed to it by various parties and by various means and holds as trustee for many minors, individuals, copartnerships, associations, and corporations resident in the United States and elsewhere, many parcels of real estate exceeding a thousand in number.

The bill contains in its successive paragraphs from 14 to 21, particular averments concerning the unconstitutionality of said Corporation Tax Law.

Thus:

PARAGRAPH FOURTEEN:

Asserts that the said law is a direct tax in respect to the real estate held and owned by the Northern Trust Company and in respect to its personal property, and that although a direct tax, it is not apportioned among the states in proportion to their population as required by Section 2 and by Paragraph 4 of Section 9 of Article 1 of the Constitution.

PARAGRAPH FIFTEEN:

Asserts that if the Corporation Tax should not be held a direct tax, but to fall under the denomination of an "Excise Tax" or any other than a "Direct Tax," then the provisions of the law are unconstitutional because they are not *uniform* throughout the United States. Uniformity, the bill claims, is explicitly required by Section 8 of Article 1 of the Constitution of the United States, as to all "duties, imposts, and excises," and is "implicitly required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax."

Subdivisions of this Paragraph 15 assert

A. That the Corporation Tax is not uniform as to *property, class or subject*, because although imposed upon corporations created and organized entirely under state laws and made by those laws persons resident in said states with all the rights of natural persons and of citizenship in those states, it is not imposed on other individuals or persons in said states or on copartnerships or associations not having a capital stock represented by shares, who are carrying on the same or similar business under

like conditions and in the same localities and having like property and income.

B. That the said tax is not uniform even among corporations, as a great number of corporations, notably in Chicago where the defendant corporation is situated, having a less net income for 1909 than $5,000, are exempted from the operation of the tax.

C. That the said tax is not uniform even among corporations in that in almost all localities where the tax would be operative there are a large number of corporations organized under state laws, which derive their income entirely from dividends upon stock of other corporations, joint stock companies and associations and insurance companies subject to said Corporation Tax, and whose entire income was so derived during the year 1909, and that said corporations by the effect of the law are equally with natural persons and copartnerships exempted from said Corporation Tax.

D. That the said tax is not uniform because of the existence of a large number of corporations organized under state laws, which derive a part of their income from such dividends from other corporations and that the tax upon such corporations is calculated at a different rate from the tax imposed upon other corporations doing a similar business under like con-

ditions, and deriving no part of their income from such dividends.

E. That the tax is not uniform in that its effect would be to lessen the income from dividends of the shareholders of such corporations as are subject thereto, and thus operate as a Federal Income Tax on such persons while all other persons resident in the United States are exempt from any Federal Income Tax.

F. That the tax is not uniform in its effect upon corporations alone even, because of the exemptions therein contained of certain organizations named; said exemptions and classifications being arbitrary and unreasonable and based on no uniform or equitable classification, and many other corporations which by the terms of the Corporation Tax Law are subject to the Corporation Tax being equally with those that are thus exempted, organized and operated as fully for the mutual benefit of their members as those which are thus exempted.

G. That if the Corporation Tax were held to be an Excise Tax and a tax or license fee upon the privilege of doing business as a corporation and thus exercising a corporate franchise, it would not be uniform throughout the United States because the incidents, privileges, immunities, obligations, and liabilities pertaining to a corporate franchise or its

exercise are not the same in all the states, but vary widely between different states and even between different classes of corporations in the same state.

Illustrations are pointed out in the bill of this variance and it is asserted that a tax on the privilege of existing as a corporation and exercising a corporate franchise is neither uniform as to the different states of the United States nor as to the corporations within each state. Thus geographical as well as other uniformity is lacking.

H. That the tax is not uniform in other respects not specifically pointed out.

PARAGRAPH SIXTEEN:

Asserts that if said Corporation Tax were held not to be a direct tax, nor a tax on property or income, and were also held to be uniform throughout the United States within the meaning of the Constitution of the United States, yet it must be held unconstitutional and void, as interfering with the reserved rights of the states under the Tenth Amendment to the Constitution.

In this paragraph it is more particularly alleged that the tax in question is not an excise tax, but whether so or not is, if not a direct tax on property or income, either a tax upon the privilege of existing as a corporation or a tax upon the privilege of doing business in a corporate capacity. In either

case the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the states to grant franchises of corporate capacity and the value and purpose of the franchises and privileges which the states have full power to grant.

It is further alleged that the tax is imposed on a great number of public service corporations in the various states, which perform public and semi-public intra-state functions, and have been given the power of eminent domain by the state for the purpose of enabling them to carry out said functions, and have thus respectively been made the direct instrumentalities and agents of the state creating them, with which Congress has no power to interfere.

The inclusion of these corporations in the operation of the law would by itself, it is alleged, render the law unconstitutional, but it is also claimed that in a wider sense all corporate franchises and all rights granted by a state to exist as corporate entities are instrumentalities of that state in the exercise of its reserved powers and functions, and cannot be constitutionally taxed or interfered with by the Congress of the United States.

PARAGRAPH SEVENTEEN:

Alleges that the reasons for holding the law unconstitutional, alleged in paragraph sixteen, apply

with especial force to the case of the defendant corporation in that it is a creation of the State of Illinois, that there has been given to it by the state the authority to perform the various public functions set forth in the second paragraph of the bill, and that by the courts of Illinois it has been given the responsibilities and placed under the obligations of such performance in many cases, and that the net income on which the Corporation Tax is imposed, or by which it purports to be measured, is in its case partly derived from legitimate compensation allowed to it by the court for the discharge of the functions and duties thus imposed on it.

Paragraph Eighteen:

Alleges the tax to be unconstitutional because it is an income tax upon the incomes of many corporations, including the defendant corporation, derived partly from state bonds and municipal bonds issued under state authority, and United States bonds, and that these bonds are not within the taxing power of Congress.

It is particularly alleged in this paragraph that the respective bonds of the state and of their governmental agencies, the counties and municipalities therein, are, together with the power of the states to borrow in any form, exempt from federal taxation; and

That the income and interest from said bonds constitute a considerable proportion of the net income of many of the corporations on which the Corporation Tax purports to be imposed, and that it was and is the intention of Congress and is essential and necessary to accomplish the purpose and general scope of the Corporation Tax; that these corporations and the income thus derived should be covered by the law.

PARAGRAPH NINETEEN:

Alleges the provisions of the Corporation Tax Law to be unconstitutional in that they impair property rights vested prior to the passage of the act, and in that they purport to impose a tax on the net income of corporations which accrued prior to August 5, 1909, the date on which said act became a law, or else purport to impose a tax on the privilege of doing business as a corporation prior to said August 5, 1909.

PARAGRAPH TWENTY:

Alleges the law in question to be unconstitutional in that all corporations thereby taxed, may, under its provisions, be deprived of their property without due process of law in violation of Article V of the Amendments to the Constitution.

PARAGRAPH TWENTY-ONE:

Alleges that the provisions of the Corporation Tax Law are unconstitutional in that all corporations thereby taxed may be compelled to disclose their private books and papers in order to make them liable to a penalty or to forfeit their property, and in any event are obliged to make returns of their private business in such manner that they become public records, open to competing and hostile examination, although the said corporations making them may have no public functions nor be affected with a public interest, and in that special information obtained by the officers charged with the collection of the tax may be made public to all competitors or enemies of any corporation at the discretion of the president, all of which provisions are in violation of Article IV and V of the Amendments to the Constitution.

There are formal allegations in the bill negativing collusion to confer jurisdiction and asserting as grounds of jurisdiction additional to that of the threatened diversion of funds by the directors and breach thereby of their fiduciary duties, that the voluntary compliance with the provisions of the law will expose the defendant Trust Company to the danger of a multiplicity of suits by its numerous

shareholders, and that such numerous suits would work irreparable injury to the business of the defendant company and the irreparable damage of its stockholders.

To this bill there was filed a joint and several demurrer of each and all of the defendants.

The Circuit Court, as above indicated, sustained the demurrer and dismissed the bill and this appeal was taken.

It was advanced for hearing under Rule 26.

Assignment of Errors.

The assignment of errors on the record are simply that the Circuit Court erred in sustaining the demurrer of the defendants; that it erred in dismissing the bill of complaint; and that it erred in not overruling the demurrer and entering a decree in accordance with the prayer of the bill.

This is equivalent to the particular ground on which we rely for reversal, which is, that the Section 38 of the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage industries of the United States, and for other purposes," is unconstitutional, null and void for the reasons set forth in the bill, and that the court below should have so found and enjoined the defendants from complying with it as prayed.

BRIEF OF ARGUMENT.

I.

Our bill (abstracted in the "Statement") sets out in Paragraphs and Sub-paragraphs—pages 2 to 15—the various grounds on which we attack the constitutionality of the Corporation Tax Law. We rely on them all but to avoid burdening the court with repetition shall argue only those following:

Argument, pages 27 to 30.

II.

The cases of *Pollock* v. *Farmer's Loan & Trust Co.* and *Hyde* v. *Continental Trust Co.*, 157 U. S., 429, and 158 U. S., 601, set at rest the questions involved therein.

We shall not, for reasons set forth in our argument, discuss preceding cases claimed to be inconsistent therewith.

Argument, pages 30 to 32.

III.

The question of jurisdiction in the present case is controlled by the *Pollock* cases, and however grave as a matter of first impression, is no longer open.

Corbus v. *Alaska Treadwell Gold Mining Company*, 187 U. S., 455, distinguished.

Argument, pages 32 to 34.

IV.

The *Pollock* cases decided (1) that taxes on the rents and income of real estate are direct taxes, and subject to the rule of apportionment; (2) that taxes on the income of personal property are direct taxes, subject to the same rule; and (3) that the Income Tax Law constituted one entire scheme of taxation and being invalid as to the income from real estate and personal property, was invalid as a whole.

The Corporation Tax—if it be an income tax—falls within the effect of each of these conclusions.

Argument, pages 34 to 42.

Under this point we urge:

(a) That in the case at bar the tax, if it be an income tax, falls on income of The Northern Trust Company from both real estate and invested personalty, including the bonds of municipal corporations.

Argument, pages 36, 37 and 41.

(b) That equally with the Income Tax Law of 1894 the Corporation Tax Law of 1909 is one entire scheme of taxation, and being so, must fail as a whole if it fails in essential parts. Citing:

Pointdexter v. *Greenhow*, 114 U. S., 270.
Spraigue v. *Thomson*, 118 U. S., 90.
Warren v. *Charlestown*, 2 Gray, 84.
Argument, pages 37 to 42.

V.

The Corporation Tax is an Income Tax, and being unapportioned is unconstitutional.

Despite the attempt of its framers by mere phraseology to negative the idea that it is an income tax, it remains so because of its essential character and substance.

Stockard v. *Morgan*, 185 U. S., 27.
Asbell v. *Kansas*, 209 U. S., 251.
Galveston, Harrisburg and San Antonio Railway Co. et al. v. *Texas*, 210 U. S., 217.
Argument, pages 41 to 48.

Under this we contend:

(a) That while a tax in certain cases may be laid on an intangible right or privilege in proportion to the value of some other property without being a tax on that property (as held in *R. R. Co.* v. *Collector*, 100 U. S., 595; *Home Insurance Co.* v. *New York*, 134 U. S., 594; *Plummer* v. *Coler*, 178 U. S., 115; *Delaware Railroad Tax*, 18 Wall., 206; *New York* v. *Roberts*, 171 U. S., 658), this is only true (1) where the value of the property by which the tax is

gauged is a reasonable measure of the value of the intangible right or privilege, or (2) where the intangible right might be altogether taken away by the taxing government and may therefore be conceded only on such conditions as that government pleases.

(b) That neither of these conditions exists as to the Corporation Tax Law. It is not within the power of Congress to deny or concede to the corporations affected their right to exist or to do business, nor is the tax proportioned to business done by them or conditioned upon their doing business at all. It falls directly on their income from all sources.

(c) That the case of *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S., 397, relied on to sustain the constitutionality of this tax as an excise tax is not in point. Its true effect is to the contrary.

VI.

If the Corporation Tax should be held not to be an income tax but an indirect tax, it must be held to be a discriminating license or privilege tax, merely arbitrarily measured by the income of the persons selected for taxation. The question then recurs: For what privilege is the tax to be paid?

It cannot be the privilege of holding property, for that would make the tax identical with a tax on property and direct. It must, in the case of a corporation, be either the privilege of existing as a

corporation or of doing business as a corporation. While it makes little difference to our argument, we contend that it must be the privilege of existing as a corporation rather than doing business as a corporation for the tax is neither proportioned to nor conditioned on the doing of business. In the case of joint stock companies and insurance companies, the tax must be on the privilege of existing as such companies.

Argument, pages 49 to 61.

VII.

Whether a tax on the privilege of being a corporation or of doing business as a corporation, the Corporation Tax is subject to the rule of "uniformity," which is *implicitly* required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax.

The Corporation Tax violates this implicitly required uniformity. Its selection of the persons to be taxed for the privilege of existence or of doing business is so "arbitrary and confiscatory" that it "transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Therefore this court should interfere.

Knowlton v. *Moore,* 178 U. S., 41.

The corporations created by the states are to the United States in the same relation as natural persons who are citizens of those states and cannot be arbitrarily selected for taxation on the privilege of existing or doing business.

Louisville C. & C. R. Co. v. *Letson,* 2 Howard, 497.

Marshall v. *Baltimore & Ohio R. R. Co.,* 16 Howard, 314.

Ohio & M. R. Co. v. *Wheeler,* 1 Black, 286.

Bank of Augusta v. *Earle,* 13 Peters, 519.

St. Louis v. *Wiggins Ferry Co.,* 11 Wallace, 423.

San Bernardino County v. *Southern Pacific R. R. Co.,* 118 U. S., 417 (Opinion of Mr. Justice Field).

Pembina C. S. M. & M. Co. v. *Pennsylvania,* 125 U. S., 181.

C. C. & A. R. Co. v. *Meekey,* 142 U S., 386.

Argument, pages 61 to 67.

VIII.

The Corporation Tax if not a direct tax is subject to the express requirement of "uniformity" in Section 8, Article 1, of the Constitution.

Even if the *expressly* required "uniformity" is merely a geographical uniformity between the states,

as held in *Knowlton* v. *Moore* (*supra*) and *Patton* v. *Brady*, 184 U. S., 608 (see, however, the concurring opinion of Mr. Justice Field, with whom three other members of the court agreed on this point in *Pollock* v. *Farmers Loan & Trust Company*, 157 U. S., 586), the Corporation Tax does not conform to it.

Argument, pages 68 to 76.

Under this point we contend that as the right or privilege of existing as a corporation or as a joint stock company or as an insurance company and the right or privilege of doing business as any one of them are very different things in one state from what they are in another, because of the differing laws of the states (for example, freedom of a corporation stockholder from individual liability exists in New Jersey but not in California), and as this court takes judicial notice on this appeal of the laws of all the states (*Hanley* v. *Donoghue*, 116 U. S., 1; *Fourth National Bank* v. *Franklyn*, 120 U. S., 747; *Case* v. *Kelly*, 133 U. S., 21; *Mills* v. *Green*, 159 U. S., 651), the Corporation Tax is within the judicial knowledge of the court unequal and wanting in uniformity between the states.

IX.

The Corporation Tax is unconstitutional whether direct or indirect and whether uniform or not, because it is an attempted interference with the instrumentalities of the states.

McCullough v. *Maryland*, 4 Wheaton, 316.

Collector v. *Day*, 11 Wallace, 113.

United States v. *Baltimore & Ohio Railroad Co.*, 17 Wallace, 322.

Railroad Co. v. *Peniston*, 18 Wallace, 5.

California v. *Central Pacific R. R. Co.*, 127 U. S., 1.

Ambrosini v. *United States*, 187 U. S., 1.

Argument, pages 77 to 91.

Under this point we first contend:

(a) That the supposed power of Congress to impose this tax involves the power to destroy the power of the states to grant franchises or privileges of corporate capacity and the value and purpose of such franchises and privileges.

(b) That such power to grant acts of incorporation is practically unlimited in the states and incident to sovereignty.

Briscoe v. *The Bank of Kentucky*, 11 Peters, 257.

(c) That the tax is on the existence of a corporation and involves the right to destroy it.

(d) That while as held in *Knowlton* v. *Moore* Congress may tax, even though it involves the power to destroy, some business or property right of a citizen or corporation, it has not the power to tax and thus destroy the right of existence of a corporation. Such a power would be tantamount to a power to tax the right to create such an existence.

California v. *Central Pacific Railroad Company*, 127 U. S., 1.

Collector v. *Day*, 11 Wallace, 113.

Van Brocklin v. *Tennessee*, 117 U. S., 151-178.

(e) That the cases of *Knowlton* v. *Moore* and *Veazie Bank* v. *Fenno*, 8 Wallace, 533, which we discuss, hold nothing to the contrary of our contention.

Argument, pages 80 to 86.

And, secondly, we contend under this point:

(a) That whatever may be said of other corporations, public service corporations in private hands furnishing transportation, water, light, or performing other public or semi-public functions, are instrumentalities of the state in the strictest sense and for that reason are given the power of eminent domain; that the functions of many of them are indeed governmental, *e. g.*, the functions of water companies.

Rogers Park Water Co. v. *Fergus*, 180 U. S., 624.

Freeport Water Company v. *Freeport City*, 180 U. S., 587.

Danville Water Company v. *Danville City*, 180 U. S., 619.

(b) That the inclusion of these public service corporations is a part of the intent under which the law was passed as an "entire scheme of taxation," and if it fails as to them it must fail as a whole—under the holding in the *Pollock* case.

Argument, pages 86 to 91.

X.

Finally,—we contend that under the allegations of our bill the Corporation Tax Law is an invalid and unenforceable enactment as against the defendant corporation in this case—The Northern Trust Company—because it is shown by those allegations that said company is in an especial manner an agency of the legislative and judicial departments of the government of Illinois, and that in its case therefore the Corporation Tax is in a peculiar and especial sense an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers:

Argument, pages 92 to 94.

And also,—that the income of municipal bonds to a very large amount is included in the income on which the Northern Trust Company threatens to pay one per centum as a tax, that such income from instrumentalities of state governments has been explicitly declared by this court untaxable by Congress directly or indirectly for any purpose whatever (*Pollock* v. *Trust Co.*, 157 U. S., at page 584 *et seq.*), and that this threatened action should be enjoined, independently of all other considerations.

Argument, pages 94 and 95.

ARGUMENT.

(The dividing Roman numerals relate to the corresponding numbering in the preceding Brief or Abstract of the Argument.)

I.

The bill in this cause sets out clearly the grounds on which the constitutionality of the law involved is attacked. We submit that upon all and each of the grounds alleged it is invalid. There are several cases involving the constitutionality of this law, to be heard together. Many of these grounds are set forth with equal force by the other parties appellant, and from the ability and learning of the counsel who represent those parties, we know that these grounds will be argued by them in this hearing with great thoroughness. Therefore, without waiving any of the matters stated in our bill in this case or being willing to be understood to minimize in any degree the gravity and conclusiveness of the various constitutional objections to the law which our bill points out, we do not conceive it will aid the court to elaborate in detail in our brief and argument all or many of them and thus by duplication of citations and syllogisms place on the court an unnecessary and superfluous burden. This would be the less justifiable because the matter in-

volved—the limitations of the taxing power of Congress—although of such immense importance, is one with which the members of the court are necessarily as familiar as counsel, however diligent, conscientious and ardent, can have possibly made themselves.

It has been the subject of its most serious consideration many times since the institution of the Government. In nothing have the wisdom, the learning and the courage of this great tribunal been more signally exemplified than in its treatment of it.

All the authorities of importance which counsel can cite on the questions involved are the utterances of this court.

These utterances are of necessity familiar to it. They must be the more so because in all the later ones, made while a large portion of the personnel of the court was the same as now, the earlier ones were discussed and distinguished, and where need was, limited and modified.

The vigor of the dissent and the thoroughness and force with which the views of the minority of the court were set forth in some of the later cases, for example in those which must of necessity prove of greatest (and as we contend of controlling) importance in the discussion of the cases at bar, but add dignity, strength and conclusiveness to the equally

well considered conclusions of the majority who were unconvinced by them, and whose opinions voiced by the Chief Justice declared for this court and therefore for the country the construction which the Constitution must bear as applied to the questions involved in those cases.

We allude, of course, to *Pollock* v. *Farmer's Loan & Trust Co.,* and *Hyde* v. *Continental Trust Co.,* argued together twice, and reported in 157 U. S., 429, and 158 U. S., 601, which we shall hereafter cite merely as the *Pollock* cases.

II.

In view of the wealth of argument analytical and historcial with which in the arguments of counsel on either side and in the various opinions of judges in the *Pollock* cases, the opinions of this court in *Hylton* v. *The United States,* 3 Dallas, 171; *The Pacific Insurance Company* v. *Soule,* 7 Wallace, 433; *Veazie Bank* v. *Fenno,* 8 Wallace, 533; *Scholey* v. *Rew,* 23 Wall., 331, and *Springer* v. *The United States,* 102 U. S., 586, were discussed, we shall not attempt to construe those cases or to comment on them save only as any one of them may seem to be relied on to establish some proposition unrelated to those which we believe were forever set at rest in the *Pollock* cases. They were of supereminent importance in the

discussion of those latter cases, and were so recognized by court and counsel alike, but the proper scope to be given them, the limitations to which they were to be held, and their varying degrees of authority were so settled in the *Pollock* cases, that we shall leave to others, if they will, to reopen a discussion on them. We shall treat as the fundamental and basic legal positions on which the constitutionality of the Corporation Tax Law is to be adjudged, the conclusions of the court embodied in the opinions of the majority in the *Pollock* cases. Behind them, to discuss the questions involved in those cases, and to distinguish preceding cases which have been claimed to be inconsistent with them we shall not go. The deluge may be taken for granted.

This was indeed the position taken by the framers and proponents of the law under discussion. It is a matter of common knowledge that it was passed as an alternative to an Income Tax, *eo nomine*, on the incomes of persons natural or artificial. It was so passed because the decision of the *Pollock* cases stood like an impassable wall between the desires of those who wished such an unapportioned income tax, and its enforcement if passed. It was recognized that this tribunal would be unlikely to depart in less than two decades from judgments so thoroughly considered and so carefully weighed. More-

over, it was then, and it is now, the natural conclusion of all thoughtful men, that it would injure the prestige of and even weaken the confidence of the people in all courts for this court to overrule a decision which upon such elaborate argument and elaborate consideration it had rendered against the constitutionality of an Act of Congress.

III.

For the same reason we shall not linger over a discussion of the jurisdiction of the courts below and of this court over the cases at bar. We are entirely willing to concede the gravity of the question raised by the existence of the Act of 1867, which is Section 3224 of the Revised Statutes of the United States, providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." That question was thoroughly discussed in the dissentnig opinion of Mr. Justice White in the first hearing of the *Pollock* cases. But we submit that it can not for a moment be supposed that the court will now, in these cases, recede from the position which Mr. Chief Justice Fuller so tersely stated in the opening paragraphs of the opinion of the court in that same hearing:

> "The jurisdiction of a court of equity to prevent any threatened breach of trust in the mis-

application or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. *Dodge* v. *Woolsey*, 18 Howard, 331; *Hawes* v. *Oakland*, 104 U. S., 450.

"As in *Dodge* v. *Woolsey*, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of and paying an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury."

This fully disposes for the cases at bar of the question of jurisdiction, however grave it might be, and was considered as a question of first impression. The cases at bar are, so far as this matter is concerned, precisely similar to the *Pollock* case and the *Hyde* case, and we do not need to make the additional suggestion that in these cases, no more than in the *Pollock* cases, have the defendants or the Department of Justice, which represents them, raised below or insisted on here this objection, or that of an adequate remedy at law. "So far as it is within the power of the Government to do so," undoubtedly the question of jurisdiction will be waived, for nothing can be more important than for the Treasury Department and its officers, and the Department of Justice and its officers to have from this court, before the payment of the tax becomes due, an authoritative statement on its widely contested validity. Without it, the litigation which will

flood the courts of the country by suits against collectors to whom money has been paid under protest or who are alleged to have made illegal exactions, will be overwhelming and intolerable.

Corbus v. *Alaska Treadwell Gold Mining Company*, 187 U. S., 455, was distinguished from the *Pollock* case, and the decision justifying the dismissal of the bill by the court below was not put on the applicability of the Statute of 1867, but on the absence of a demand by the complainant on the directors to protect the corporation against the alleged illegal tax. Had he shown an effort to do so, even, the court says, "a different case would have been presented."

In our cases, as in all the others before the court in this hearing, the allegations of an effort to secure the action of the directors of the several companies to protect the complainants are not only alleged but particularly set forth.

IV.

In pursuance of the plan indicated for our argument therefore, we address ourselves at once to that which in most important aspects is the one thing necessary to decide at the outset of the inquiry.

The law, before it passed the Senate of the United States, was most vigorously and exhaustively dis-

cussed. It was urged by many constitutional lawyers there, and is our position here, that it levies a direct tax on incomes. If it should be so held by this court, there is an end of the argument, for if the tax be an income tax, it is not the less obnoxious to the constitutional objection that it is an unapportioned direct tax, because instead of being levied on all persons natural and artificial, having an income above a certain figure, as was the Law of 1894 adjudged invalid in the *Pollock* cases, it is limited to corporations (that is, a particular kind of artificial persons constituted by the various states entities with the rights of natural persons resident within the state), together with associations of natural persons, not corporations, pursuing the particular business of insurance, or having a capital stock represented by shares.

And the *Pollock* cases decided that a general tax on incomes derived from "any source whatever" is a direct tax and cannot be levied unless apportioned among the states in proportion to their populations.

It is true that before summing up its conclusions at the final hearing of the *Pollock* case, the court declared that it had considered the act only in respect of the tax on income derived from real estate and from invested personal property, and, as the opinion declares, had not "commented on so much

of it as bears on gains or profits from business privileges or employments, in view of the instances in which taxation on business privileges or employments has assumed the guise of an excise tax, and been sustained as such."

But to the two conclusions which found: *First*, that taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes; and, *Second*, that taxes on personal property or on the income of personal property are likewise direct taxes, the court added a *Third:* That as the tax in question, so far as it fell on the income of real estate and of personal property was a direct tax within the meaning of the Constitution and therefore unconstitutional and void because not apportioned according to representation; the entire law "*constituting* one entire scheme of taxation" was necessarily invalid.

Within the necessary effect of each of these conclusions falls the case which we are arguing.

In its application to a great multitude of corporations throughout the country, and especially and definitely in its application to the corporation involved in this case of *Smith* v. *The Northern Trust Company*, the Corporation Tax, if it be a tax on income, falls on income from both real estate and from invested personalty.

The bill to which the demurrer was sustained expressly sets forth that the Northern Trust Company may by law loan money on personal and real estate security; that it may execute trusts of every description; that in its trust capacity it is administering real and personal property of the aggregate value of many millions of dollars; that it derives an income from such sources, and that it holds in its own right real estate located in the City of Chicago of the value of more than one million dollars, from a part of which it receives income and rents of about nine thousand dollars per annum, and that it derives an income of more than fifty thousand dollars annually from its investments in interest-bearing bonds of cities, counties, public parks, and other municipal corporations, and that the Corporation Tax is a direct tax in respect of its real estate and personalty.

It has been suggested that even were the law to be held unconstitutional in its attempt to tax income from investments in real and personal property, it might be held valid as to all other, or some other income.

We submit that this position is untenable. As in the Income Tax Law of 1894, the provisions of the Corporation Tax Law of 1909 constitute one entire scheme of taxation. The taxation of income

arising from real estate and from invested personal property is in both laws a part of the warp and woof of that scheme. In neither case, it is apparent, would Congress have been willing to pass a law which should have exempted or taken no account of such income from real estate and personalty, while levying on, or measuring the tax by, the remaining income of all persons taxed in one case and of the selected persons taxed in the other.

The essential language which describes the income on which the tax is to be levied is nearly identical in the two acts. In that of 1894 the tax was expressly levied on

> "the gains, profits and income received in the preceding calendar year by every citizen of the United States * * * and every person residing therein, whether said gains, profits or income be derived from any kind of property, rents, interest, dividend or salaries, or from any profession, trade or employment or vocation * * * *or from any other source whatever.*"

In that of 1909:

> "Every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company * * * shall be subject to pay annually a * * * tax * * * equivalent to one per centum upon the entire net income * * * received by it *from all sources during such year,*" etc.

We fail to see any reason for holding as against

corporations, the law of 1909—if invalid so far as it affects the income from real estate and invested personalty—good in part and as affecting certain other kinds of income, which was not of equal force for holding as against all persons (corporations as well as others) the law of 1894, although invalid so far as it affected the income from real estate and invested personalty, good in part and as affecting such other kinds of income.

But this court, at the final hearing of the *Pollock* case, in cogent words rejected the argument in favor of such a holding as to the law of 1894, and in doing so cited and quoted with confirmatory approval the language of this court in *Pointdexter* v. *Greenhow*, 114 U. S., 270, and in *Spraigue* v. *Thomson*, 118 U. S., 90, and the language of the Supreme Judicial Court of Massachusetts, by the mouth of Chief Justice Shaw, in *Warren* v. *Charlestown*, 2 Gray, 84. It would serve no useful purpose to repeat that language herein. The statement in each case is an enunciation of the established rule that courts cannot, in order to establish the partial validity and effect of a law, confer upon it a partial and discriminating operation which they cannot say the Legislature would have desired and provided for in the absence of the invalid portion of the law.

Can it be even doubtful that Congress would have declined to pass the Corporation Tax Law of 1909 had the income from the real estate and invested personalty of all corporations been by its provisions exempted from the income on which the tax was to be computed? It even refused to heed the recommendation of the President who suggested the exclusion of national banks, whose income is practically all from invested personalty.

It is perhaps not too much to say that the chief arguments used for the passage of the law gained all their force from the fact that corporations in the opinion of many of its supporters were absorbing an undue proportion of the resources of the country in their holdings of real estate and in their accumulation of immense amounts of invested personal property.

To hold the tax valid as to other income of corporations but not as to the income from these factors in corporate wealth would be actually to effect the exact opposite of that which Congress desired. It would be to tax corporations so far as they are active and useful business bodies and exempt them so far as they are rich, idle, and grasping.

And yet if it be only doubtful even, whether Congress would have passed the law emasculated in the manner suggested, this court must, if it ad-

judges it invalid as to the income from real estate and invested personal property, declare it invalid altogether, for, in the language of Mr. Justice Mathews in *Pointdexter* v. *Greenhow:*

> "To hold otherwise would be to substitute for the law intended by the Legislature one they *may* never have been willing to enact."

Before we proceed to a discussion of what the Corporation Tax is levied on, and what is its proper designation, we call attention to the fact that in the case of the defendant corporation, the bill alleges that an income of over fifty thousand dollars is derived by the Northern Trust Company annually from municipal bonds, bonds the income of which the unanimous opinion of the court in the *Pollock* cases (as distinguished from its holding on all other contentions), decided could not be taxed by the Federal Government because such bonds were the instrumentalities of the state. We shall return to this consideration later and in another connection, but we stop to allude to it here to ask further, whether it can be conceived to have been even the intention of Congress to tax the incomes of all the corporations of the country, save and except that derived by its trust companies and banks and other financial corporations from municipal bonds. Setting aside the matters on which the court was divided in the *Pollock* case—the validity of the unapportioned

federal taxation on the income of real estate and personalty—we have, if this Corporation Tax be a tax on incomes, in the attempted taxation of the income of state and municipal bonds a factor and component part of "one entire scheme of taxation," which factor and part an undivided court in the *Pollock* case found impossible and invalid.

V.

Thus we are brought in this main branch of our argument directly to the question: Is this Corporation Tax an income tax?

It is true the act imposing it does not so denominate it. Indeed, it is conceded at the outset that in its mere phraseology (but in its phraseology only) the first care of its framers and proponents was to negative the idea that the tax enacted was to be an income tax.

It was to be "a special excise tax"—if calling it so could make it so. It was not to be "one per centum upon the entire net income, etc." It was to be "equivalent to one per centum upon the entire net income, etc." It was not even to be a tax "on the carrying on or doing business by such corporation, etc.," but a tax "*with respect to* the carrying or doing business, etc."

The adoption of this last language from the opin-

ion of Mr. Justice Harlan in the *Spreckels* case (*Spreckels Sugar Refining Company* v. *McClain*, 192 U. S., 397), where it was entirely in place, to use it in a legislative act where it was emphatically out of place (for it is juridical, not legislative, phrasing), accentuates the foreboding of the authors of the law that it could not readily pass the tests to be applied by this tribunal. To secure this end they called the tax that which it was not—"an excise tax"—they resorted to what, with all respect, be it said, seems to us the trivial expedient of using the words "equivalent to," instead of the word "of"; and they used juridical in place of apt legislative language in the hope that by the use of these words alone they could, as it has been expressed, "attach this tax to the business rather than to permit it to be attached to the property."

We submit that the authors of the law, able and ingenious as they were, were attempting an impossibility. This court would not exercise the high prerogative of finding a tax levied by the Congress of the United States unconstitutional and void if phrased in one set of words, but, although exactly the same in substance and result, constitutional and valid if phrased in another. Such refinements and technicalities are not practices of great tribunals, least of all of this one. The Income Tax of 1894, ad-

judged void in the *Pollock* cases, would not have been held valid had it run, "There shall be assessed, levied, collected and paid annually, with respect to the carrying on of the business of receiving income, gains and profits, by every citizen of the United States, whether said gains, profits or income be derived from any kind of property, etc., * * * or from any other source whatever, a tax equivalent to two percentum on the amount so derived, etc." Not such are the methods of this court, which looks through all legal fictions and pretenses straight to the heart of the matter involved.

It will have no sympathy with an astuteness which plays fast and loose with language in legislation in the hope that by using one phrase a purpose can be accomplished constitutionally, which comes into collision with the Constitution, if another in substance and real effect identical, is used.

Citation of authority is not needed for so plain and patent a truth, but express authority of this court is not wanting to this very proposition.

In *Galveston, Harrisburg and San Antonio Railway Company et al.* v. *Texas*, 210 U. S., 217, in holding that the State of Texas could not impose a certain tax upon railway companies equal to one per centum of their gross receipts, Mr. Justice Holmes, in the opinion of the court, says:

> "Neither the state courts nor the Legislatures" (and the same rule must apply to Congress) "by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

And again:

> "This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

And he cites, in support of his language,

Stockard v. *Morgan*, 185 U. S., 27, and

Asbell v. *Kansas*, 209 U. S., 251.

Passing from mere phraseology to real substance, what is the Corporation Tax levied on? If not on incomes, on what does it fall? It has certainly all the *indicia* of an income tax.

As has been well said by another (Machen on The Federal Corporation Tax), *prima facie*, a tax is laid upon that in proportion to which its amount is measured; and where a tax may be laid on an intangible right or privilege, in proportion to the value of some other property, without being a tax on that property (as it is conceded that this court has held it may in some cases be: *Railroad Company* v. *Collector*, 100 U. S., 595; *Home Insurance Co.* v. *New*

York, 134 U. S., 594; *Plummer* v. *Coler*, 178 U. S., 115; *Delaware Railroad Tax*, 18 Wall., 206; *New York* v. *Roberts*, 171 U. S., 658), it is because the value of the property by which the tax is gauged is a reasonable measure of the value of the intangible right or privilege, or where the intangible right might be altogether taken away by the taxing government and may therefore be conceded on such conditions as that government pleases.

Neither of these conditions exist as to the law under discussion.

It cannot, we submit, properly be held or considered to be a license or privilege tax on the right to be or to do business as a corporation, for it is not within the power of Congress to deny or concede such powers to a corporation like the defendant corporation here (and like the great majority of those corporations which this tax affects), or to prescribe the conditions on which they may be exercised within the state creating it. We shall have occasion to discuss this proposition in another aspect in a subsequent branch of our argument, but we state it here, as a reason for its being impossible to hold this tax anything but an income tax on the ground that it is merely proportioned or measured by the income.

Nor despite the peculiar phraseology which calls

it a tax "with respect to the carrying on or doing business," can it be considered a tax on doing business at all. It is not proportioned to the amount of business done by the corporation or other association or company taxed, nor to the amount of income received from any such business, but to "the net income over and above five thousand dollars received by it *from all sources* during such year, exclusive of amounts received as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed." In the case of companies organized under the laws of the United States or of any state or territory of the United States or under the acts of Congress applicable to Alaska, it is imposed on them whether they do any business or not. The net income which these companies derive may be entirely from real estate, or entirely from invested personalty, it may indeed be from the municipal bonds which, and the income from which, this court has unanimously declared Congress cannot tax. The companies may be doing no business—but be merely "incorporated gentlemen of leisure" (Vann, J., in *People* v. *Roberts,* 154 N. Y., 1), or they may be doing business at a loss, more than made up by their income from real estate or invested personalty before accumulated. But in

each case this tax of one per centum falls with the same force and directness on their income over five thousand dollars.

What is this but an income tax? And how does the expedient of calling it "A Special Excise Tax" alter or conceal its true character? And is it any less obnoxious to the objections to its constitutionality because it is levied on some citizens and persons (artificial and natural) over whom and whose business Congress has no visitatorial or regulatory power, rather than on *all* the citizens of the country, as was the Income Tax of 1894?

Unless these questions can be answered satisfactorily—in a sense different from that which seems to us the obvious one—this tax must fall as within the construction of the Constitution laid down in the *Pollock* case.

The case of *Spreckels Sugar Refining Company* v. *McClain,* 192 U. S., 397, is especially relied on as an authority which will sustain this tax as an "Excise" tax and negative the proposition that it is an "Income" tax. We cannot so consider it. Its effect seems to us the opposite. The tax involved in the *Spreckels* case was imposed on the gross receipts in their business of *all* persons carrying on either of two specified occupations. It was therefore certainly an "Excise Tax." The court expressly held that

the tax being an excise tax on the particular occupations named, no part of the gross receipts made the measure of the excise not having a necessary connection with those occupations could be considered in fixing the amount of the tax, and reversed and remanded the case because they had been so considered.

The tax involved in the cases at bar, does not purport to be measured by the receipts in any particular business or in business at all. It is, like the Income Tax of 1894, measured by an income from "all sources." It does not fall on all persons engaged in any particular occupation or occupations. It falls on one peculiar kind of persons by virtue merely of their existence and their having an income, as the Income Tax of 1894 did on all citizens by virtue of their existence and income. It is neither in spirit nor letter within any holding in the *Spreckels* case.

VI.

To the conclusion that the Corporation Tax Law provides for an income Tax and must therefore stand or fall by that description, our own opinion is that there is no admissible contradictory or alternative proposition.

As a tax on the income from real estate and in-

vested personal property owned by the corporations and the other associations subject to the tax, it cannot, because unapportioned, be sustained by this court, unless the court is prepared to depart from its decision in the *Pollock* cases. Of that possibility we shall take no further account, for nothing that we could say would render less remote the contingency nor add force to the arguments for adherence to it which are already in the minds of the court.

Whether or not the Government will concede that if the Corporation Tax is an Income Tax it falls within the ruling of the *Pollock* cases, we do not know.

Whether or not, if such a concession be made, it would ask the court to recede from anything laid down in the *Pollock* cases, we do not know.

We do know, however, that the Government does not concede that the Corporation Tax is in any sense an Income Tax, but holds fast to the theory that it is, as it terms itself, "A Special Excise Tax." We pass then as in pointing out in our bill the constitutional objections to the law we did, from our own view of its real nature to that taken by the Government, shifting the battleground only that we may meet the defenders of the law on their own chosen field and with their own weapons.

In the further discussion of the questions involved, for the sake of the argument, and for the sake of the argument only, we shall eliminate from consideration the thesis of the truth of which we are really convinced, that the Corporation Tax is an Income Tax, and therefore a direct tax, and adopt the other, which we have indicated, we believe inadmissible; that it is, if not as it calls itself, "A Special Excise Tax," at least an indirect tax.

We do not care in this branch of the argument more than in the preceding one to haggle over the mere meaning and use of words. Therefore, we shall enter on no discussion of whether admitting this tax to be indirect and not an Income Tax, it is properly termed an "Excise Tax." We think it might be easy to show from the definitions of the word "Excise" as applied to governmental impositions, by legal and general lexicographers alike, from the famous unjustifiably prejudiced exposition of Dr. Johnson, to the present time, that the strictly proper use of the term "Excise" makes it refer only to a tax on commodities or on particular occupations, which this tax certainly is not.

But we do not see any good end to be attained by such a showing. Our faith is strong, as before indicated, that it will not be by names legislatively given, but by things legislatively done, that this

court will be governed in the disposition of these cases.

If Congress did not attempt to levy a direct income tax, it did attempt to levy an indirect privilege, license or franchise tax. By whatever name it may be called it falls within the class of indirect taxes which the Constitutional Convention in its finished work, lumped together as "duties, imposts, and excises."

We do not think it is necessary or useful in view of the language of the majority opinion of the court at the first hearing of the *Pollock* cases, 157 U. S., at page 557, and never withdrawn, to enter upon any discussion of whether there can be any tax levied by Congress which is not a direct tax nor included under the words "duties, imposts and excises."

The Chief Justice in that opinion, said:

> "Thus in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes and lays down two rules by which their imposition must be governed, namely, the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.
>
> "The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of Section eight to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section.
>
> "And this view was expressed by Mr. Chief

> Justice Chase in *The License Tax Cases*, 5 Wallace, 462-471, when he said: 'It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. Congress cannot tax exports and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited and thus only it reaches every subject and may be exercised at discretion.'
>
> "And although there may have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

We may then in this branch of the argument build on the foundation that if the tax in question be not "a direct tax," it falls, if not within the strict definition of an "excise," yet within the terms generically used by the Constitution makers, "duties, imposts and excises," and is subject to the rule of uniformity.

But the essential question which then meets us again is not What is the proper name of this tax—which must be "uniform"—but On what is it levied? or For what is it to be paid?

Answers to these questions are necessary before we can properly discuss the question lying beyond: Has the rule of uniformity been followed in its imposition? And the one still farther on: If the rule

of uniformity has been thus observed, is the tax invalid because levied on and exacted for something which causes it to infringe on the rights reserved to the States under the Federal Constitution?

The questions "On what is it levied?" or "For what is it to be paid?" are, however, really identical on that hypothesis on which we are proceeding which eliminates the conception difficult to banish from the mind—that as this tax is directly proportioned to the income of the persons taxed it falls on that income.

But if we are to succeed in thus banishing this conception, we must do it by first, with whatever effort is necessary, accepting the proposition of the Government, as it has always been that of all the advocates and defenders of the tax, that the net income of the respective parties taxed has nothing to do with the matter, except as a *measure* for the amount of a discriminating *license or franchise* tax to be placed on them.

This was the position, it may be noted, taken in the ablest though not the longest arguments made in favor of the validity of the law in the Senate of the United States. Senator Daniel baldly stated the theory which we have indicated,—the only other theory which can be invoked with plausibility even, to withdraw this tax from the category of direct in-

come taxes. In opposing the practical exemption of holding corporations, which by the provision concerning deductions finally secured a place in the bill, he said, "An impression * * * that it is taxing property twice if a corporation holds stock in another corporation if both corporations are taxed with respect to the holding of such property * * * is a complete confusion of thought. If a holding corporation owns bonds or stocks, it does not by this proposition pay any tax on them at all as bonds or stocks. They are simply used as a yardstick by which the measure of the excise, which is in the nature of a license tax, shall fix the number of dollars for that license or privilege." Senator Root said: "It matters not from what source may come the income which is seized upon by the law as a measure for the value of the facility which is taxed."

It does not, we will admit, look very logical that Congress should nevertheless have allowed the deduction of the income from all corporation stocks owned by a holding company, from the "yardstick measure," but we must remember not only that logic is not always a distinguishing mark of legislative bodies, but also that we are now excluding only by hypothesis, the view that Congress, despite the theory of the framers and chief advocates of the law that phraseology could hide substance, intended to

pass another direct income tax law to enable this court to reconsider its conclusions in the *Pollock* cases.

Much more logical viewed in the light of its own theory is the ruling of the Department of Justice, despite its apparent injustice in effect, that the various issues of the bonds of the United States exempted from taxation by the laws which issued them, must yet be computed as within the sources of that income which is to be the "yardstick," with which to measure the "license," "franchise" or "excise" tax which the Corporation Tax is alleged to be.

But still, when the idea that the income, of which an aliquot percentage is to be taken in the license tax, is a mere measure is fully assimilated, the question recurs: For what privilege is this license tax to be taken?

As we are eliminating by hypothesis the possibility of this tax being one on property or income we must eliminate also the idea that it is a tax on the privilege of holding property. Certainly no one would attempt to make a distinction in nature between a tax on property and a tax on the privilege of holding property, or a distinction between a tax on income and a tax on the privilege of receiving income. To do so would be to contend that to make an

unapportioned Federal tax on real estate, on invested personal property or on municipal bonds valid, it is only necessary for Congress so to change the phraseology as to declare it a tax on the privilege of owning real estate, of owning invested personal property or of owning municipal bonds. This would be a *reductio ad absurdum*, not necessary to comment on.

In view then of the hypothesis eliminated, there are but two answers to the question, "For what privilege is this license tax to be taken?" possible to formulate. One is that it is for the privilege of doing business, not any special or particular kind of business, but any business whatever. This of course implies further that selected apparently arbitrarily from all other persons and bodies whatever, corporations, joint stock companies and associations organized for profit and having a capital stock represented by shares, and insurance companies, shall alone be required to pay a license tax for the privilege of doing business, while all other persons and associations may do the same business without such an imposition.

The other possible answer is that this license tax is to be paid in the case of a corporation for the privilege of being a corporation and in the case of any of the other associations or companies men-

tioned in the law for the privilege of being such an association or company.

We are not advised to which alternative the Government will commit itself. To one it certainly must.

On which one it is desirable to base an argument for the validity of the tax the Department of Justice has undoubtedly decided, but no such decision was reached by the proponents or advocates of the bill before it passed. It is a matter of common knowledge that the law as recommended by executive message was to be "a tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock." But the law as passed was not the law recommended and as to whether the tax under the law that was passed would fall on and be paid for the privilege of *doing business* as a corporation, joint stock company, association having shares of capital stock or insurance company, or on the privilege of *existing* as a corporation, company or association, its advocates seemed hopelessly at sea.

We think it really makes little difference in the last analysis, and particularly as bearing on the objection of the want of uniformity which we are now considering, which answer may be adopted. So far

as corporations are concerned, like the defendant corporation, the answer must be either that it is a tax on, and paid for, the privilege of doing business as a corporation, or a tax on, and paid for, the privilege of existing as a corporation; and in either case we shall contend it is obnoxious to the objection of want of constitutional uniformity expressly required, and to the wider one charged in our bill, of want of the uniformity "implicitly required by the Constitution of the United States and the principles of free government as to all taxes so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax."

But it appears to us clear that the first answer which would describe the tax as a tax on the privilege "of doing business" is absolutely inadmissible for the reasons which we urged heretofore in another branch of our argument. It is not proportioned to the amount of business done, nor to the amount of income received from such business, and, more conclusive still against the description, the tax is not in the case of domestic corporations dependent on the doing of any business nor on the ability to do any business. The mere use of the phraseology, "with respect to the carrying on or doing business," cannot overcome considerations like these.

It is, therefore, on the privilege of *being* a corporation that the tax is laid, if it be a privilege or license tax.

It may be said—indeed, it has been said (Machen on Corporation Tax)—that the tax cannot be on the privilege of existing as a corporation, because it is applicable not only to corporations but to various unincorporated bodies.

The obvious answer to this is, that if it is a privilege tax at all, it is a privilege or license tax laid on different privileges. So far as corporations are concerned, it is laid on the privilege of being a corporation, and undoubtedly it was principally for the purpose of affecting corporations that the law was passed. But Congress added to that privilege to be taxed, the privilege of being a joint stock company organized for profit and having a capital stock represented by shares, the privilege of being an association organized for profit and having a capital stock represented by shares, and the privilege of being an insurance company. It is true that this was a somewhat heterogeneous collection, but we have before noted that the logical working out of the original idea of the tax seems to have been defective. It does not prevent the tax on a corporation from being a tax on the privilege of being a corporation, because the tax on a joint stock company

is a tax on the privilege of being a joint stock company. Indeed, as we shall hereafter point out more in detail, the privilege of being a joint stock company of the kind described in the law does not in some states differ more from the privilege of being a corporation than the privilege of being a corporation in one state differs from the privilege of being a corporation in another.

We shall assume, therefore, in the mere phrasing of our further argument, that the only plausible alternative to the holding that the Corporation Tax is a direct income tax on certain selected persons, is that in the case of a corporation it is "a privilege or license tax" on the right to be a corporation. We do this because it seems to us true, not from the necessity of the argument, for all that we shall suggest will apply, in substance, as well, if the tax is on the privilege of doing business as a corporation, as though it were on the privilege of existing as a corporation. Indeed, does not the franchise or charter granted by a state to exist as a corporation imply a right to do business?

VII.

Consider, then, first, on whom this privilege tax principally falls:

Corporations like the one involved in this case are creatures of the state under whose laws they are incorporated. They are artificial persons regulated

within that state, it is true, by the laws of the state which created them and which may impose such conditions on their existence as it pleases. So, too, may other states impose conditions on the exercise of their functions—practically on their existence—in such states. But to the Federal Government they are in the same relation as natural persons having the same rights of citizenship in the creating state. The United States has no regulatory or visitatorial powers over them which it does not have over all persons in its jurisdiction. And the same thing is true of insurance companies and joint stock or other associations of the nature described in the law.

Were authorities necessary for this proposition we could cite them in scores from the decisions of this court. We content ourselves with mentioning only:

Louisville C. & C. R. Co. v. *Letson*, 2 Howard, 497.

Marshall v. *Baltimore & Ohio R. R. Co.*, 16 Howard, 314.

Ohio & M. R. Co. v. *Wheeler*, 1 Black, 286.

Bank of Augusta v. *Earle*, 13 Peters, 519.

St. Louis v. *Wiggins Ferry Co.*, 11 Wallace, 423.

San Bernardino County v. *Southern Pacific R. R. Co.*, 118 U. S., 417 (Opinion of Mr. Justice Field).

Pembina C. L. M. & M. Co. v. *Pennsylvania*, 125 U. S., 181.

C. C. & A. R. Co. v. *Mackey*, 142 U. S., 386.

Unless, then, the defenders of this tax are, as has been well said, prepared to go to the extent of asserting that Congress can levy at its discretion a tax upon all red headed men, or all blue eyed men, or both, under the guise of a privilege or license tax for being thus red headed or blue eyed; or, at the very, least, can levy a tax on the privilege of such red headed or blue eyed men to do business in the United States, while leaving untouched by such taxation all other men doing the same business, this law must fail on their own theory.

And so some at least of its advocates have conceded and boldly avowed their belief in the hypothetical proposition. They have done this, acknowledging that such a tax would not be uniform between citizens throughout the United States nor between persons in the same states; admitting, too, that it would be an arbitrary classification of persons to be taxed, not justified ethically, as they contend this Corporation Tax is, but nevertheless constitutional and beyond the power of this court to interfere with or to declare invalid. The ground of this contention is that the unconstitutionality of a tax can not be declared unless it is shown that it infringes on the express words of the Constitution limiting the otherwise uncontrolled right of Congress to tax.

The uniformity required in the levying of indirect

taxes, they say, is a geographical, not an inherent, uniformity and means only that the tax must be operative in all the states alike.

We shall briefly allude to this question of the nature of the expressly required uniformity in another connection, but for the purposes of the argument at this point, we admit that such has been the decision of this court as to the meaning of the express limitation of uniformity "throughout the United States" imposed upon indirect taxes by the Constitution.

But we are unprepared to admit the further necessary premise of the argument of the defenders of the tax that the unconstitutionality of a tax must absolutely be found in the express words of the Constitution.

We have alleged in our bill, as before noted, a conclusion of law that uniformity is, if not expressly, yet "implicitly required by the Constitution of the United States and the principles of free government as to all taxes so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax," and for that proposition we strenuously contend. On it we are certainly not foreclosed by any utterance of this court, which, in the case most strongly insisted on as establishing forever and beyond all controversy that

the express uniformity required by the Constitution is only a geographical one (*Knowlton* v. *Moore*, 178 U. S., 41), said:

> "It may be doubted by some, aside from express constitutional restrictions whether the taxation by Congress of the property of one person accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, *would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.* On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since as we understand the law, we are clearly of the opinion that it does not sustain the construction which was placed on it by the court below."

Again:

> "If a case should ever arise where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious."

We contend that the time spoken of by Mr. Justice White has now come; that the tax under discussion is "arbitrary and confiscatory," and that in-

herent and fundamental principles for the protection of the individual should be applied.

It is not the exercise of an allowed legislative discretion raising merely a question of abstract justice and expediency that selects from some millions of persons engaged in myriads of differing mercantile, manufacturing, agricultural, fishing, mining, financial and other industries, several hundred thousand only, whether because of their blue eyes or red hair or because they are in the purview of the state which created them alone, artificial rather than natural persons, and subjects them to a privilege or license tax either for the right of existing or for the right of carrying on their various and varied occupations.

It is so much a matter of common knowledge that it is not out of place in this argument to allude to it, that there are 400,000 corporations in this country and that not one per cent, with the exception of the railroads, are doing a business more public with reference to the interests of the United States than the millions of men in and out of partnerships, engaged in the purely private business activities of the country. The trade or business that the majority of these corporations carry on reaches down to the local mercantile business of small cities and towns where they are competing perhaps with

powerful individual or partnership rivals, at whose mercy these corporations who have themselves no counter-balancing advantages against such rivals, will be by the operation of this law placed, if it should be held valid.

We do not urge these considerations with any reserved thought that they can affect the judges of this court if it is to be held that they are matters merely of expediency and exact justice, to be therefore properly addressed to Congress alone; but because we believe them to be proof of such gross discrimination and arbitrary exercise of power in taxations as in the striking language of Mr. Justice White for this court, "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

We shall not press the argument on this point further. It is of a nature that will appeal to this court at once and spontaneously or not at all. If we are wrong in our conception of the power of this court or of the exceptionally arbitrary discriminations of this tax, the court will not be moved by our insistence; if we are right, the court will recognize it and prevent by the exercise of its highest prerogative and duty a great injustice to the citizens who have associated themselves together in corporations and joint stock companies.

VIII.

We come now to the express uniformity "throughout the United States" required by the Constitution in duties, imposts and excises.

In our bill (of which there is an abstract in the statement prefixed to this argument), we have in Paragraph Fifteen under alphabetical arrangement set forth certain particulars as we conceive them, in which this tax does not conform to the rule of uniformity. As to those which are listed under subparagraphs A, B, C, D, E, F and H, we will concede that they lose much of that part of their force which rests upon the *express* uniformity required by Section 8 of Article 1, of the Constitution, if that uniformity is not an inherent but a mere geographical uniformity. That it is a mere geographical uniformity we must also concede was held in *Knowlton* v. *Moore, supra,* and in *Patton* v. *Brady,* 184 U. S., 608.

On that proposition therefore we shall only presume to say that in the *Pollock* cases, in which the tax under discussion bears much more resemblance to the Corporation Tax than those discussed in *Knowlton* v. *Moore* and *Patton* v. *Brady,* four members of this court, as shown by the opinion on the first hearing, held that the tax violated the uniformity required, and Mr. Justice Field's concurring

opinion declared that "the correct meaning of the provisions requiring duties, imposts and excises to be uniform throughout the United States" is that the law imposing them should have an equal and uniform application in every part of the Union, and that "if there were any doubt as to the intention of the states to make the grant of the right to impose indirect taxes subject to the condition that such taxes shall be in all respects uniform and impartial, that doubt should be resolved in the interest of justice in favor of the taxpayers."

And because of the exemptions which were little different in principle in the Income Tax Law of 1894 from those provided for in the Corporation Tax Law of 1909, he announced his conclusion that the part of the Income Tax Law which levied duties, imposts and excises was void in not providing for the uniformity required by the Constitution in such cases. As we have said three other justices of the eight then sitting agreed with him in that conclusion and in consequence the precise question (which became an academic one in the subsequent hearing of the case) was not decided at either hearing.

But in each of the sub-paragraphs of our bill referred to are allegations concerning the provisions of the law which no holding of this court has deprived of whatever force they may have to the minds

of its members in connection with the considerations we have already urged against the power of Congress under the *implicit* requirements of our Constitution and system of government, to make arbitrary, unreasonable and grossly discriminating classifications in the levying of taxes.

But farther:—on the strictest construction of the constitutional limitation to uniformity in excise and other indirect taxes we contend that we have pointed out in sub-paragraph G of Section 15 of our bill matters which show that this Corporation Tax does not conform to it. The tax is no more uniform geographically between the states than inherently between individuals, partnerships and corporations within the respective states.

The tax, so far as a corporation is affected, is one on the right or privilege of existing as a corporation; so far as a joint stock company is concerned, of existing as a joint stock company; so far as an insurance company is concerned, of existing as an insurance company;—or at the very best that can be said of it on the right or privilege to do business as a corporation, a joint stock company or an insurance company respectively.

But the right or privilege of existing as a corporation or as a joint stock company or as an in-

surance company and the right or privilege of doing business as any one of them, differs widely in its nature among the different states. These rights and privileges are very different things in New Jersey, for example, from what they are in California.

For illustration: In the executive message which first proposed a corporation tax to the Senate and in much of the discussion in that body it was assumed that the privilege of existing or doing business as an artificial entity included a right of freedom from individual liability by those who owned stock. So it does in New Jersey for example in the case of most corporations at least. But no such freedom from liability is connected with the right or privilege of being or doing business as a corporation in California, where by the constitution of the state, each stockholder of a corporation is made individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. (Constitution of California, Article XII, Sec. 3.) It is not only alleged in our bill—it is within the judicial knowledge of the court (for the Supreme Court on appeals from the federal court takes judicial notice of the laws of all the states—(*Hanley*

v. *Donoghue*, 116 U. S., 1; *New York Fourth National Bank* v. *Francklyn*, 120 U. S., 747; *Case* v. *Kelly*, 133 U. S., 21; *Mills* v. *Green*, 159 U. S., 651), that the rights duties and privileges and obligations of corporate existence differ so widely in different states that this Corporation Tax is the taxation in different states of entirely different things by accident more than design having the same name. The word "Corporation" has no more the same meaning in California that it has in New Jersey than it has in England, where it is understood to mean a municipal governing body.

What is this but a want of geographical uniformity? Words can hardly make it plainer.

The same propositions are emphatically true of insurance companies and of joint stock companies in the various states. They are created, supervised and regulated by and under entirely different laws in different states. The right or privilege therefore of being a joint stock company and the right or privilege to do business as a joint stock company is an entirely different right or privilege in one state from that which it is in another.

In some states joint stock companies are not, we think, provided for by statute at all. In such states, what is a joint stock company? In the federal law

the term certainly has no specific meaning. Is there a common law definition of it? If so, it is, in those states, the right or privilege of being such a joint stock company as has a common law organization that has to be paid for by this tax. But in other states it is, by statute, necessary to the legal existence of a joint stock company that certain documents be filed in a public office. Failure to file them leaves the company a mere partnership. In other states the same form of organization constitutes a joint stock company without any filing of papers. Thus, identical organizations would constitute in one state joint stock companies subject to the tax and in another state mere partnerships not taxed. Again, where is the geographical uniformity? It is violated in as plain and obvious a manner as the framers of the Constitution could ever have feared it might be when establishing the limitation.

It will not do to say that such organizations as by the force of statute law are left partnerships because of failure to comply with filing requirements, will fall within the description of "associations organized for profit and having a capital stock represented by shares," for the "shares" will be shares in a partnership in no wise differing from these duplicate originals of a partnership agreement which define

and specify the respective interests of the partners in the common fund or capital of the partnership, and we have not heard any claim and do not believe that such a one will be made that the intent of Congress covers partnerships, although the law does not expressly qualify the term "shares" with a limitation that they must be transferable.

And to illustrate the general obscurity of the law, we may ask what sort of an "association" or combination of people "organized for profit and having a capital stock" can there be which is not a corporation, a joint stock company or a partnership?

The laws which regulate the business and duties and rights and very existence of insurance companies, of banks and trust companies (like the Northern Trust Company), and of their stockholders, vary so much in the different states that it would take a volume to enumerate the differences. Does the tax on the right or privilege of being an insurance company, or bank, or trust company, or of doing business as an insurance company, bank, or trust company, fall on the *same* right or privilege in these different states? Is there uniformity in such a tax "throughout the United States," even if we give those words the strictest geographical meaning? These questions admit to our minds only of a nega-

tive answer. If that be the true answer, this tax must fall, even if it be truly an "excise" tax and "indirect."

Before we leave this subject of geographical uniformity we wish to allude to some alleged significant decisions of this tribunal which have not been officially reported and the statement of which, therefore, as made by an eminent Senator and constitutional lawyer, we have had no means of verifying prior to the printing of this argument. We use the matter, therefore, in no sense as authority, but only as illustration.

The Senator had made the extreme declaration to which we have before alluded and which we dispute, that Congress could validly tax all red headed men engaged in a given line of business, if the tax fell upon every red headed man in Massachusetts as well as in Mississippi and in Texas and in all other states.

He was asked:

> "Can the general Government tax the cotton of the south and leave the wheat of the western farmer untaxed?"

To which he replied:

> "Congress did once levy a cotton tax and it was attacked in the courts. The trial Judge held the law constitutional and the case was appealed to the Supreme Court of the United States which then consisted, I believe, of only eight members, there being a vacancy, as I re-

call, in the Chief Justiceship. The question was argued and re-argued and probably argued a third time in that tribunal. The judgment below was affirmed without any opinion by a divided court, four of the Judges holding the law unconstitutional and four holding it constitutional. The four who held it unconstitutional did so, as I have always understood, upon the ground that the court must know judicially that cotton could not be grown in all the states and therefore that the tax on it could not be uniform. I have always regretted that the opinions in that case have never been published. The Senator's inquiry suggests a very pertinent consideration. *I do not myself believe that Congress has the power to levy a tax which the court can judicially know is incapable of uniform operation.* I do not hesitate to say that if that cotton tax had been levied at any time except in a period of great exasperation and sectional prejudice the court would have unanimously held it void. I must not forget to pay Congress the compliment to say that after the argument of that case, Congress had the good sense to repeal the Cotton Tax Law. That is the reason it was never finally and judicially tried out to a conclusion."

We agree with the learned and distinguished lawyer, whose words these are, that Congress has no power to levy a tax which this court can judicially know is incapable of uniform application. Such a tax is the one under discussion. The court not only can, but must, judicially know, if this tax be an excise tax on privileges or rights, that inasmuch as it falls on rights and privileges radically and inherently different in the different states, it is incapable of even geographically uniform application.

IX.

We pass now to another branch of our argument.

It is upon the objection to the tax specifically set forth in the sixteenth paragraph of our bill that if it be an excise tax—a franchise privilege tax—whether or not it be held uniform throughout the United States within the meaning and intent of the Constitution, it is in conflict with the Constitution of the United States because the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair and destroy the power of the states to grant franchises of corporate capacity and the value and purpose of such franchises and privileges which the states have full power to grant,—and because the tax is, both generally in its effect upon all the states and particularly in its effect on the defendant corporation and others like it, an attempted unconstitutional interference with instrumentalities of the states.

This objection to the law is one which we should deem, even in the absence of all others, controlling and decisive, and it is from no want of a sense of its importance and weight that we shall content ourselves here with a very concise and unelaborated

argument to sustain it in its widest and most fundamental aspect. But we know that it will receive from other counsel before the court the comprehensive and detailed discussion which it deserves, and we do not desire to duplicate and repeat unnecessarily matters which are thus sure to be fully and exhaustively treated by others.

The objection reduced to its lowest terms may be said to be this:

The power to tax involves the power to destroy, as the often repeated utterance of Chief Justice Marshall in *McCulloch* v. *Maryland* asserted. The power of creating corporations is a reserved right of the states. It is practically unlimited in the states. As this court said in *Briscoe* v. *The Bank of Kentucky*, 11 Peters, 257, p. 317:

> "A state may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty."

But if Congress, by taxing, can destroy the right or privilege of being a corporation, it infringes on the power of the state to create corporations.

And here, for the first time in our argument, we think that the question we have before discussed, whether this Corporation Tax is placed on the privilege of being or existing as a corporation or on

the privilege of doing business as a corporation, becomes, although not vital, of some importance.

For it has been urged by others and may be urged by the Attorney General here that a doubt might exist whether a federal tax could be laid upon the charter of a corporation granted by a state, which tax must be paid *before* that corporation could go into existence, but that such doubt does not exist about the tax under discussion because it is a tax levied upon the *business* of such a corporation *after* it goes into operation and is to be collected under penalty, and not by the forfeiture of its charter.

In view of the consideration that if the tax is placed on the privilege of doing any business as a corporation, it is placed on the privilege which is in the last analysis all that the charter is granted for and means, the distinction seems to us to be too fine to be vital even in this phase of the argument; but even more clearly does the fact that the tax is not made a condition precedent to the mere granting of the charter or incorporation right appear immaterial, if this tax is one not on the privilege or right of *doing business* as a corporation, but upon the very right or privilege of *being* a corporation. That this is the true nature of the tax, considerations which we have hereinbefore mentioned force us to believe. And this view is further strength-

ened by the fact that those attributes of corporations which it is claimed render them, rather than natural persons, proper objects of this discriminating tax, privileges which it is said should be paid for, namely, persistence in existence and exemption of stockholders from individual liability (which latter privilege, however, as we have before remarked, does not always exist) are inherent characteristics of the franchises granted by the state, elements in the very existence of the corporations, and no part of the business which they conduct.

If the tax is thus on the very existence of a corporation and the right to tax involves the right to destroy, it can make no difference as to its constitutionality whether it is placed on the right of the state to grant the franchise or on the franchise when granted, nor whether its payment is a "condition precedent" or a "condition subsequent."

We are well aware that an argument from the famous and somewhat epigrammatic utterance of Chief Justice Marshall, which has been quoted, may easily be pressed too far. The force of the reasoning on this point of Mr. Justice White in his opinion in *Knowlton* v. *Moore* (*supra*), and of other members of the court in the cases that he therein cites, can be denied by no reasonable man. "If a lawful tax can be defeated," he says, "because the power which

is manifested by its imposition, may, when further exercised, be destructive, it would follow that every lawful tax would become unlawful and therefore no taxation whatever could be levied. Under our constitutional system both the national and the state governments moving in their respective orbits have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

And so, applying this thesis to a tax *not* "on the right to regulate the devolution of property on death," but "on the transmission or receipt" to and by the heir or devisee, the opinion rejects the argument against such a tax that "wherever a right is subject to exclusive regulation by either the Government of the United States on the one hand, or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate," declaring rightly that such an argument might be applied to the right to receive conveyances, mortgages, leases, pledges and indeed to the right to all property and the contracts which arise from its ownership (since they, too, are subject to state regulation exclusive in its na-

ture), as well as to the right to inherit, or receive by legacy, and thus the authority of the National Government to tax almost every subject of direct and many acknowledged objects of indirect taxation would be excluded.

And in accordance with the analogous doctrine that the power residing in a state to regulate (or, indeed, prohibit) a given business, does not make unconstitutional an act of Congress imposing a tax on carrying it on, the License Tax cases (Wallace, 462), were decided.

But neither *Knowlton* v. *Moore* nor the License Tax cases nor the kindred cases cited in the opinion in *Knowlton* v. *Moore,* are like the cases at bar. It is not the taxation of some business or property right which the states have the power to regulate and control that is objected to in this case. It is, on the other hand, a tax on the very right or privilege of existing at all, a very different thing. Such a tax on the privilege or right of existing is tantamount, it seems to us, to a tax on the right to create such an existence, and to fall within the other language of the opinion in *Knowlton* v. *Moore,* which declares that:

> "*The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may*

be lawfully embraced therein, even although it happens in some particular instance no great harm may be caused by the exercise of taxing authority as to a subject which is beyond its scope."

We can not formulate to ourselves a more apt statement to apply to the Corporation Tax. Except for its requirement of publicity in the returns (which the court might not find so involved in the general intent and scheme of the law that it could not be adjudged unconstitutional without overthrowing the entire tax), the burdens of this particular tax law might not be considered intolerable, but it *is* intolerable to any believer in the reserved rights of the states that a power to destroy the privilege of existing as a legal entity granted by a state in the exercise of an exclusive right to do so, should reside in Congress.

Not such was the holding in the cases before referred to, cited in the opinion in *Knowlton* v. *Moore*.

The case of *Veazie Bank* v. *Fenno*, 8 Wallace, 533, may be considered the nearest in point to the contrary contention. But in that case it was plainly the exercise of one business only, which was allowed to the bank by the franchise creating it—that of circulating notes to pass as money—on which the tax fell, and that one a business which was a function in itself allowed the Federal Government.

This particular right or privilege, therefore, as has been well pointed elsewhere by one of the counsel in one of the cases now before the court, was subordinate to powers expressly conferred on Congress to provide a currency for the whole country by appropriate legislation. Under these circumstances it was more significant that two Justices dissented from the judgment affirming the validity of the tax on the ground that it affected the power of the state to create corporations, than that the Chief Justice, in voicing for the majority of the court the reasons for their decision, should have added to the sufficient ground of the powers of Congress over the currency, and to the statement that the tax was one not on any franchise of the bank but on property created or contracts made by the bank, a further statement that it could not "be admitted that franchises granted by a state are necessarily exempt from taxation, for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserve power of a state, seem to be as properly objects of taxation as any other property."

Aside from the fact that this is a dictum only of the Chief Justice, it bears no such construction as the Government may be tempted to put upon it. That by "franchises," Chief Justice Chase meant

and meant only, particular and specific "franchises" or branches of private business allowed by state law to state created corporations, is shown not only by the whole tenor of the opinion, but by the fact that in the argument for the Government, it was only claimed that the tax was "an excise or duty on a branch of business" and that the power to tax included the power "to make taxation burdensome or even destructive *to particular branches of business*"—a proposition which we certainly do not dispute.

Our case falls rather within the general language of Mr. Justice Bradley speaking indeed of the attempt of a state to tax franchises granted by the United States:

> "The power conferred emanates from and is a portion of the power of the Government that confers it. To tax it is not only derogatory to the dignity but subversive of the powers of the Government and repugnant to its paramount sovereignty."
>
> *California* v. *Central Pacific R. R. Co.*, 127 U. S., 1.

For he further said in the same case:

> "No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise*";

and this court has also said and repeated:—

> *Collector* v. *Day*, 11 Wallace, 113;
>
> *Van Brocklin* v. *Tennessee*, 117 U. S., at page 178; and
>
> *Pollock* v. *Trust Co.*, 157 U. S., at page 584:

> "The general Government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and indefendently of each other, within their respective spheres. The former in its appropriate sphere is supreme, but the states within the limits of their powers not granted or in the language of the tenth amendment, 'reserved,' are as independent of the general Government as that Government within its sphere is independent of the states."

But whatever may be said or thought of the right of Congress to tax a franchise or the privilege under a franchise granted by a state, either to exist or to do business, and whatever may be the extent of that right of Congress or its limitations—on one thing there is not and never has been doubt or difference. Congress can no more tax the public instrumentalities of the state than can the states tax such instrumentalities of the federal government.

This court said in *Ambrosini* v. *The United States*, 187 U. S., 1, that the law of self-preservation exempts any and all means and instrumentalities of state government from federal taxation.

The same doctrine explicitly declared—sometimes applied to attempts of the states to tax the instrumentalities of the federal government and sometimes to attempts of the federal government to tax the instrumentalities of the states—runs through the decisions of so many cases that to attempt to

make a catena of them is useless. It is the settled and recognized law of the land. A few of such cases may be cited:

McCullough v. *Maryland*, 4 Wheaton, 316.

Collector v. *Day*, 11 Wallace, 113.

United States v. *Baltimore and Ohio Railroad Co.*, 17 Wallace, 322.

Railroad Company v. *Peniston*, 18 Wallace, 5.

California v. *Central Pacific R. R. Co.*, 127 U. S., 1.

Ambrosini v. *United States*, 187 U. S., 1.

The Corporation Tax, as attested by all the arguments of its advocates; by the common knowledge that without the inclusion of the corporations which furnish transportation, water, light, intelligence-transmission, or perform other public or semi-public functions, the revenue to be expected from the tax would be relatively insignificant; and by the internal evidence of its provisions for publicity which in the case of merely private business enterprises can find no plausible pretext of justification; was perhaps framed more for the purpose of falling on public service corporations than on any others.

The inclusion of these corporations within the operation of the law is (as we have said is also the case as to the income of corporations from real

estate and invested personalty) part of the warp and woof of the law, "constituting one entire scheme of taxation." If these corporations cannot be constitutionally taxed under it therefore, we submit the "entire scheme" must fail, and the law as a whole be declared invalid on the doctrine declared in the *Pollock* cases, and referred to in the first branch of this argument.

And what are these public service corporations but instrumentalities of the state?

They certainly are not the recipients of mere private privileges either of existing or doing business, and yet it is on the assumption that such is the character of the privileges granted to corporations by the state that the argument for the right of Congress to tax them rests. It is not necessary to advance any debatable theories or to discuss the propriety or advisability of a more specific and complete public ownership of these public utilities to negative the idea that when they exist in private hands, as the great majority of them do today, they are not nevertheless so far impressed with a public character and function that both by its grants to them and its demands from them the state creating them has made them and treats them as its agencies and instrumentalities to perform public services.

The most ardent individualist does not now deny that to them are given a part of the power of the state,—some of the attributes of its sovereignty which it can control at all times and can in many cases and under certain contingencies recall. That the function of a water company supplying water to a village community is a governmental function was distinctly asserted for example (and the example is only one of scores that could be cited) in *Rogers Park Water Company* v. *Fergus*, 180 U. S., 624. In the similar cases decided at the same time of *Freeport Water Company* v. *Freeport City*, 180 U. S., 587, and *Danville Water Company* v. *Danville City*, 180 U. S., 619, it was admitted by both majority and minority opinions in a discussion of the question unnecessary to go into here of the right of a municipality to make an irrevocable alienation of such a governmental function, that for Illinois at least the Supreme Court of that state seemed to have adopted a theory which if followed would prohibit such an alienation. We allude to these cases only to show how undisputed is the doctrine that these public service corporations are exercising, under grant of the state, governmental functions of the state.

But certainly no citation of authority is really necessary for this. Multitudes of these corporations, including practically all the intra-state as well as

inter-state traction or railroad companies, are given some right of condemnation under the doctrine of eminent domain. He certainly would be a bold man who would deny that that power was a grent of governmental function to an agent or instrumentality of the state. Under the principle of eminent domain every man holds his property subject to the supreme right of the sovereign to take it. But it is the right of the sovereign and of no one else. The state is the sovereign in our system by which this very highest power of government is often used to take from a man his homestead or his farm without his consent. But the state uses in doing it its instrumentalities and agencies which, in the form of public service corporations, exercise the power of condemnation given them, leaving to the courts in effect only the determination of the compensation. The right of the party whose property is taken for public use to compensation is an express constitutional one, and not a part of the common law doctrine of eminent domain. It is not the courts, it is the state through the corporation to which it has granted the power "to take private property for public use without the owner's consent," that exercises this sovereign power of eminent domain. Are not then the corporations that exercise it instrumentalities and agencies of the

state in the strictest and most precise meaning of those words?

We submit that federal tax can neither be laid on the right of such corporations to exist nor on their right to do a public business. Truly in such a case the power to tax *is* the power to destroy the means which the sovereign state in the plenitude of its power has deemed the best instrumentalities through which to supply to its citizens the very necessaries of life—water, light, transportation and information. The words of this court in *Veazie Bank* v. *Fenno* come back to us naturally for repetition:

> *"The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."*

But if the "license or privilege" tax—that this Corporation Tax is claimed to be—cannot be validly placed on these public service corporations, we submit that it cannot be placed on any, for the inclusion by the law of public service corporations is an evident part of the intent under which the law was passed as "an entire scheme of taxation."

X.

Even were the law not to fail as a whole because of its inclusion of public service corporations as we strenuously insist that it must, yet the tax would lack validity against the defendant corporation in the particular case which we are arguing and against all similar corporations, made by the law of the state creating them public agencies and instrumentalities of the state in a form analogous to, although differing from, that which is the characteristic of public service corporations.

Our bill alleges that the Northern Trust Company, the principal defendant, has, among other powers granted to it by the State of Illinois,

1. That of receiving an appointment by any court of competent jurisdiction in the State of Illinois as trustee, receiver, assignee, guardian, conservator or administrator.

2. That of so becoming under order of court the depositary of funds held by such officers as to discharge those officers from further care or responsibility for said funds.

3. That of so becoming such a depositary with the effect of reducing or dispensing with the public bonds of said officers.

The bill also alleges that because of these semi-public functions which it is authorized to perform

the Northern Trust Company is held to very strict reports to and relations with the State of Illinois, and has been obliged to deposit with an officer of the state government $200,000 in bonds of the United States or other approved securities.

The bill also alleges that the defendant, the Northern Trust Company, as a matter of fact has, under its charter authority and by the provisions of state legislation been appointed trustee, guardian, conservator, executor and administrator in a very great number of cases, and in its trust capacity under such appointments now holds and is administering real and personal property of the aggregate value of many millions of dollars; and that it receives a considerable and valuable income from its frequent appointment by the courts of Illinois as trustee, receiver, assignee, guardian, conservator, executor or administrator, and from the orders of courts of competent jurisdiction in Illinois by which receivers, executors, administrators, conservators, guardians, assignees and other trustees are required or are authorized voluntarily to deposit the moneys in their hands as such officers or trustees, with the said defendant corporation.

It is an agency through which to adopt language from *U. S.* v. *Baltimore & Ohio R. R. Co.* (*supra*),

"The legislative, executive and judicial de-

> partments of the state administer their own affairs in their own manner.
>
> "This carries with it an exemption of these agencies and instruments from the taxing power of the federal government. If they may be taxed lightly they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted."

We submit without further argument that the allegations of fact above recited justify the further allegation of law made in paragraph seventeen of our bill that in the case of the Northern Trust Company, "in a peculiar and especial sense, the Corporation Tax is an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers."

Moreover, the allegations of the bill show that the Northern Trust Company "owns and holds interest bearing bonds of cities, counties, public parks, and other municipal corporations of the value of not less than one million four hundred thousand dollars and that all of the cities, counties, parks and municipalities whose bonds are so held by said Trust Company are corporations created by the State of Illinois or other states of the United States as and for part of the governmental machinery of the respective states," and that it derives an income of more than $50,000 annually from these bonds.

On such bonds or on their income an undivided court in the *Pollock* cases (see Mr. Justice White's dissenting opinion at the first hearing, 157 U. S., 652), held that no federal tax *direct or indirect for any purpose whatever* can be imposed, because these bonds are the agencies and instrumentalities of the state governments. Nothing can be plainer than this holding or than the doctrine of the cases cited in the opinion of the court to sustain it. It seems to us that in substance and essence they apply whether the income be considered the thing taxed or the measure by which the tax is gauged.

Yet, as the bill alleges, the defendants intend, despite the protest of the complainant, to pay as this Corporation Tax, one per cent of the net income of the Company, including its income from municipal bonds.

That an injunction should have been granted by the Circuit Court against its doing so, we submit with confidence.

And with this proposition we purpose to close this argument, leaving to the court without further discussion from us the allegations of our bill in Paragraphs 19, 20 and 21, which call in question the retrospective nature of the tax as to income accruing before August 5, 1909, and the much criticized and

bitterly unjust provisions of the law which absolutely require publicity in matters which affect no public interest and subject to the discretion of the executive the divulging of more intimate and detailed information still—when such information has been obtained by inquisitorial and summary processes. These elements of the law, however inexpedient and ill-advised, might by themselves perhaps be upheld as within the discretion of Congress as means of enforcing the tax, if in its essential substance it should be held valid or they might be overthrown without involving what we have designated as the warp and woof of the statute. We do not doubt however that they will receive full attention in these aspects from other counsel before the court. We have endeavored only to make plain our reasons based on fundamental principles for believing the entire enactment invalid and void, and we leave our contentions in the hands of the court, knowing that whatever its duty may seem to its members to be, it will be wisely and courageously done.

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APPENDIX.

AN ACT TO PROVIDE REVENUE, EQUALIZE DUTIES AND ENCOURAGE THE INDUSTRIES OF THE UNITED STATES, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Sec. 38.—That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies, or associations or insurance companies subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or

insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources; (first) all the ordinary and necessary expenses actually paid, within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all

interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided,* That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year

from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the

place where its principal business is caried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies

the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policies and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof and separately the amount so paid by it for taxes imposed

by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matter required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employe of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or em-

ployes and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return

is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employe of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discreiton of the court.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of

not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

Sec. 42.—That unless otherwise herein specially provided, this Act shall take effect on the day following its passage.

Approved. Signed five minutes after Five o'clock, P. M., August 5th, 1909.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 1064, 1065.

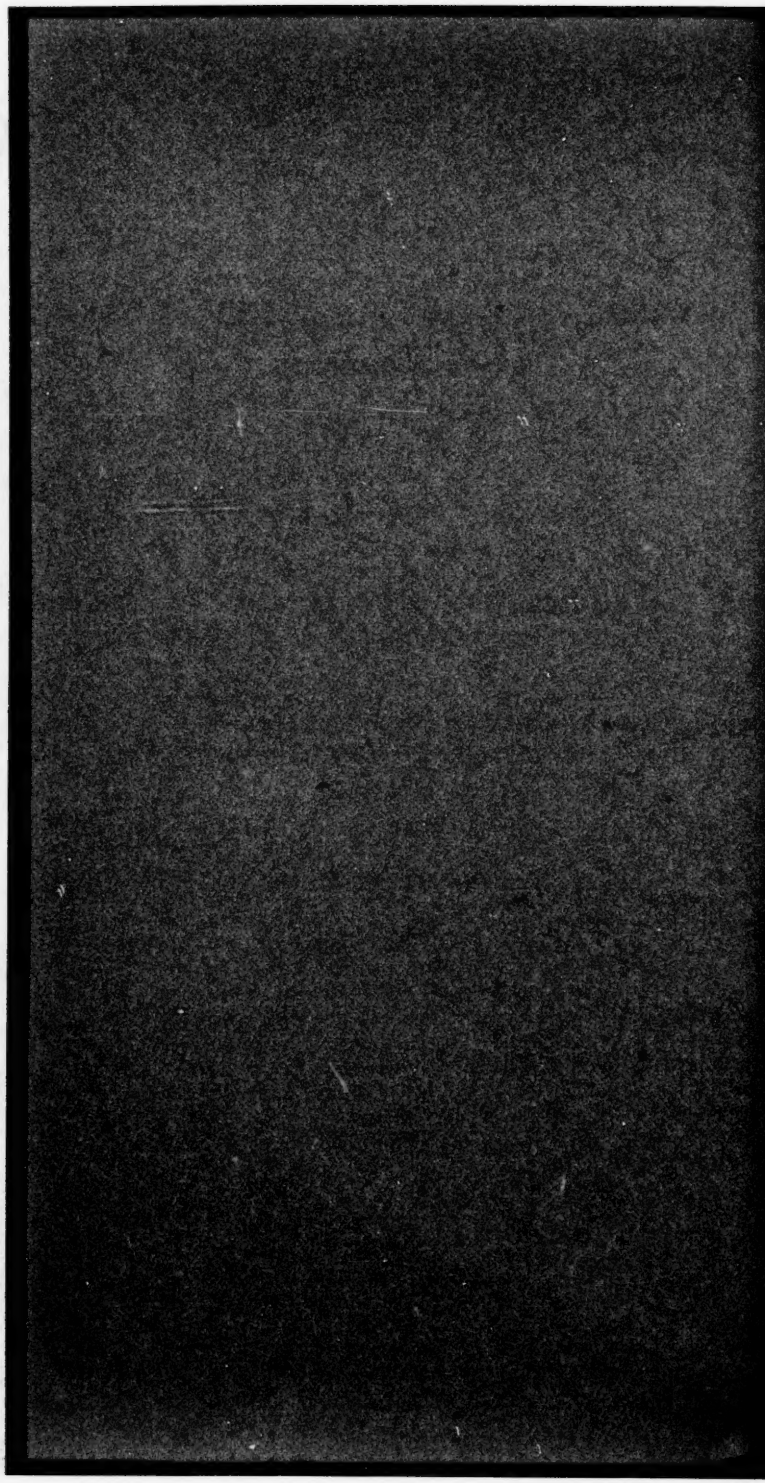
WILLIAM H. MEIER, APPELLANT,

vs.

THE CORN EXCHANGE NATIONAL BANK OF MILWAUKEE, CHARLES H. WACKER, MASTER, &c., ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED NOVEMBER 27, 1907.



(21,980.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 754.

WILLIAM H. MINER, APPELLANT,

vs.

THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. WACKER, MARTIN A. RYERSON, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 31, 1910.

1 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

29863.

WILLIAM H. MINER
vs.
THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill, and B. C. Sammons.

Messrs. Peckham, Brown, Packard & Walsh, Solicitors for Complainant, Mr. Edward Osgood Brown, of Counsel.
Messrs. Judah, Willard, Wolf & Reichmann, Solicitors for Defendants, Mr. Noble B. Judah, of Counsel.

2 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting at the United States Court room, in the City of Chicago, in said District and Division, before Hon. Christian C. Kohlsaat, Circuit Judge of the United States for the Seventh Judicial Circuit, on Monday, the twenty-fourth day of January, in the year of our Lord one thousand nine hundred and ten, being one of the days of the regular December term of said Court, begun Monday, the twentieth day of December, 1909, and of our Independence the one hundred and thirty-fourth year.

H. S. STODDARD, *Clerk*.

3 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

29863.

WILLIAM H. MINER
vs.
THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill, and B. C. Sammons.

Be it remembered, that on this day to-wit: the nineteenth day of January, 1910, come- the complainant in the above entitled cause by his solicitors and filed in the clerk's office of said Court his certain Bill of Complaint in words and figures following to-wit:

4 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

WILLIAM H. MINER
vs.
THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulbird, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill, and B. C. Sammons.

Bill of Complaint.

Peckham, Brown, Packard & Walsh, solicitors for complainant; Edward Osgood Brown, of counsel.

5 In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

WILLIAM H. MINER
vs.
THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulbird, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill and B. C. Sammons.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Northern District of Illinois, Sitting in Equity:

William H. Miner, a citizen of the State of Illinois and a resident of the City of Chicago in the said state and in the Eastern Division of the Northern District of Illinois aforesaid, brings this, his bill of complaint in behalf of himself and all other stockholders who are similarly situated, of the Corn Exchange National Bank of Chicago, hereinafter named and described, and who shall be entitled to avail themselves of the benefit of this suit, against the Corn Ex-
6 change National Bank of Chicago, a corporation, created and existing under and by virtue of the laws of the United States, located and having its principal office for the transaction of business in the City of Chicago, in the Eastern Division of the Northern District of Illinois, and Charles H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair,

Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill and B. C. Sammons, all citizens of the State of Illinois, and residents of said Eastern Division of the Northern District of said state, and who are as hereinafter set forth, directors of the said corporation, the Corn Exchange National Bank of Chicago.

And thereupon your orator complains and represents unto your Honors as follows:

First. Your orator shows that the defendant the Corn Exchange National Bank of Chicago (hereinafter sometimes designated as "Corn Exchange National Bank"), is a corporation duly organized and existing under an Act of Congress called The National Bank Act, approved by the President on June 3, 1864, and subsequently amended.

By said act it is authorized to exercise by its Board of Directors, or duly authorized agents, all such powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evi-
7 dences of debt, by receiving deposits, by buying and selling, exchange, coin and bullion, by loaning money on security and by obtaining, issuing and circulating notes.

It is also authorized by said act, to purchase, hold and convey such real estate as shall be necessary for its accommodation in the transaction of its business, and such as may be mortgaged or conveyed to it or purchased by it in satisfaction of or security for debts previously contracted to it.

And your orator shows that under the provisions of said act it is obliged to pay and does semi-annually pay to the Treasurer of the United States a tax on its circulating notes, and that under said act and the Statutes of the State of Illinois, it is obliged to pay and does pay annually to the proper officers of the State of Illinois, taxes on its real estate.

Your orator further shows that under said act and the Statutes of Illinois, the shares of the capital stock of the said defendant corporation are taxable by the authority of the State of Illinois as the personal property of the owners and holders of said shares, and that its officers are required to retain any dividends belonging to said shareholders until said taxes are paid.

Second. Your orator shows that the net income of the defendant the Corn Exchange National Bank, received by it from all sources during the year ending December 31, 1909 (exclusive of amounts received by it as dividends upon stock of other corporations,
8 joint stock companies or associations or insurance companies subject to the Corporation Tax so-called alleged as hereinafter set forth to be authorized and provided for in Section 38 of the Act of Congress entitled "An Act to provide revenue, equalize duties and encourage industries of the United States and for other purposes," approved August 5, 1909), amounted to the best of your orator's knowledge, information and belief to more than $500,000.

Said net income of at least $500,000, is the amount remaining after deducting from the gross amount of the income of said de-

fendant Bank all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, interest actually paid within the year on deposits, all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof or by the Government of any foreign country as a condition to carrying on business therein and all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations or insurance companies, subject or purporting to be subject to the so-called "Corporation Tax" above described.

And your orator shows that for many years the net income of the defendant the Corn Exchange National Bank computed as
9 above set forth has been more than $500,000 annually, and that as your orator is advised and believes it will continue so to be in the future for successive calendar years, beginning with the year 1910.

Third. Your orator shows that the said defendant the Corn Exchange National Bank is the owner of a parcel of real estate or a chattel real in the form of a leasehold interest for 99 years in certain very valuable land in the City of Chicago, on which it has erected a banking building, of which it is the owner, for its immediate accommodation in the transaction of its business, and that it was obliged to and did, in the erection of said building, for the purpose of making an economical improvement which should be productive and prevent its own rent from being excessive, construct a building of which several floors above the ground floors are rented to various tenants from whom it derives a large income and rent; that the said leasehold and building thus belonging to the defendant Bank are of the value of nearly two million and a half dollars and that the income derived therefrom by the defendant Bank amounts to not less than ninety thousand dollars per annum, after paying or deducting all national, state, county, school or municipal taxes.

Fourth. Your orator shows that the said defendant the Corn Exchange National Bank is the owner of bonds of the United States to the amount of $1,175,000, and of United States Govern-
10 ment Territorial Bonds of the Philippines and Hawaii to the amount of $530,000 and that it derives an income of about $24,000 annually from its investments in bonds of the United States and of about $20,000 from its investments in the territorial bonds aforesaid.

Fifth. Your orator further shows that the affairs, business and property of the said defendant Company are managed and conducted by fifteen directors and that the defendants Charles H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hammill

and B. C. Sammons are all citizens of the State of Illinois and residents of said Eastern Division of the Northern District of said state, and that said defendants are the directors of the said corporation, the Corn Exchange National Bank, duly elected as such, and that they are now acting in that capacity and managing and conducting all and singular the affairs and business of said defendant Bank.

Sixth. Your orator further shows that he is a citizen of the State of Illinois and a resident of the City of Chicago in the said state and in the Eastern Division of the Northern District of Illinois aforesaid; that prior to October 3, 1906, he became the owner and
11 registered holder of shares of the capital stock in said Corn Exchange National Bank, and that he has ever since been and still is a stockholder therein, owning and holding in his own right three hundred shares of its capital stock, the value of which three hundred shares exceeds the sum of $120,000. The capital stock of said Corn Exchange National Bank is divided among a large number of different persons who as such stockholders constitute a large body, and this suit is for an object common to them all.

Your orator therefore brings this suit in his own name and in his own behalf as a stockholder in said Corn Exchange National Bank and also as a representative and on behalf of such of the other stockholders similarly situated and interested as may choose to intervene and become parties hereto.

Seventh. Your orator further shows that as he is informed and verily believes, the defendant the Corn Exchange National Bank and a majority of its directors who are managing and conducting its property, business and affairs as aforesaid, have determined that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for Other Purposes," approved August 5, 1909, the said defendant the Corn Exchange National Bank is liable to
12 pay and that they intend to pay for it to the United States on or before the thirtieth day of June, 1910, a tax equal to one per centum upon the entire net income of the said defendant Bank over and above five thousand dollars received by it from all sources during the calendar year ending December 31, 1909, exclusive of amounts received by it as dividends upon the stock of other corporations, joint stock companies or associations or insurance companies subject to the same alleged tax, including the income derived from the interest in real estate which it holds as above set forth, and from the bonds of the United States, and from the other public bonds, state and municipal, of which it is the owner.

Eighth. Your orator further shows that as he is informed and verily believes, in alleged compliance with the requirements of the Act of Congress aforesaid, the defendant the Corn Exchange National Bank and its said directors have avowed their intention and purpose voluntarily to make and file with the collector of internal revenue for the First District of Illinois, prior to the first day of March, 1910, a statement or return under oath of its president,

vice-president and other principal officer, and of its cashier or assistant cashier, setting forth:

(*a*) The total amount of its paid up capital stock outstanding on December 31, 1909.

(*b*) The total amount of its bonded or other indebtedness on said date.

(*c*) The gross amount of its income received during the year 1909 from all sources and the amount received by it within the year by way of dividends upon stock of other corporations, joint stock companies or associations or insurance companies pur-
13 porting to be subject to the alleged "Corporation Tax" as above described.

(*d*) The total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of it- business and properties within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition of its continued use or possession of any of its property.

(*e*) The total amount of all its losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property.

(*f*) The amount of interest actually paid by it within the year on its bonded or other indebtedness, stating separately all interest paid by it within the year on deposits.

(*g*) The amount paid by it within the year for taxes imposed under the authority of the United States or any state or territory thereof, and

(*h*) The amount of its net income after making the deductions which the said Act of Congress heretofore described prescribes shall be made from its gross income to ascertain its net income—said deductions being the amounts of the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business, all losses sustained during the year and not compensated by insurance or otherwise, including an allowance for the depreciation of property, interest paid within the year on its bonded or other indebtedness and the interest actually paid by it within the year on deposits, all sums paid for taxes during the year and all amounts received within the year as dividends upon stocks of other corporations, joint stock companies or associations or insurance companies subject to the alleged tax.

14 Ninth. Your orator further shows that he is informed and verily believes that the defendant, the Corn Exchange National Bank, and a majority of its directors who are managing and conducting its affairs as aforesaid, also take the position that for each successive year after 1909 the said defendant Bank will be liable to pay and that they intend voluntarily to pay for it to the United States on or before the thirtieth day of June in each successive year a tax equal to one per centum upon the entire net income of the said defendant Bank over and above five thousand dollars, computed and calculated as in the Eighth Paragraph of this bill set forth, and that the said defendant, the Corn Exchange National Bank, and its said

directors, propose voluntarily to make and file with the Collector of Internal Revenue for the Northern District of Illinois, prior to the first day of each successive year—after 1910—a statement or return for the year ending on the preceding 31st of December, showing the same matter and items as in said Eighth Paragraph of this bill it is alleged that they intend to make and file with said Collector for the year ending December 31, 1909.

Tenth. Your orator avers that the provisions of said Act of Congress of August 5, 1909, as above set forth, which are found in the Thirty-eighth Section thereof, and which purport to render liable the defendant corporation and all other corporations, joint stock companies or associations organized for profit and having a
15 capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any state or territory of the United States or in Alaska or in the District of Columbia (with the exception of certain organizations, associations and corporations which do not include the defendant corporation or any corporation of its nature and class), to pay annually a tax of one per centum upon the entire net income over and above five thousand dollars received by it from all sources during each year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies subject to the same tax, or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its territories, Alaska and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock or other corporations, joint stock companies or associations or insurance companies subject to the same tax (the said tax being denominated in said Section 38 of the Act of Congress aforesaid as "a special excise tax with respect to the carrying on or doing business" by corporations, joint stock companies or associations and insurance companies "equivalent to one per centum upon the entire net income over and above five
16 thousand dollars," etc,), are unconstitutional, null and void, and furnish no justification to the defendant corporation or its directors for the payment of said tax or for the returns to the Collector of Internal Revenue, purporting to be required by said Section 38, which payment and returns the defendant corporation and its directors nevertheless are threatening and purposing to make, both for the year 1909 and subsequent successive years, claiming that they are required so to do by said provisions of said Act of Congress.

Eleventh. Your orator (without conceding that the said provisions of the Act of Congress of August 5, 1909, purporting to levy a tax on corporations as above described, which tax will be for convenience hereafter in this bill designated merely as the Corporation Tax, are otherwise constitutional or valid, but protesting that in other respects than in those particularly enumerated in this bill he

is advised and believes them to be unconstitutional, invalid and therefore null and void as applied to the defendant corporation) avers that the provisions of said Corporation Tax incorporated in said Act of Congress are in conflict with the provisions of the Constitution of the United States and are null and void in the particulars and for the reasons set forth in the paragraphs from the Thirteenth to the Twentieth, inclusive, of this bill.

17 Twelfth. Your orator avers that the said Corporation Tax is a direct tax in respect of the real estate held and owned by the defendant, the Corn Exchange National Bank, and in respect to its personal property, and that said direct tax is not in and by said act apportioned among the several states according to their population, as required by Section 2 of Article I of the Constitution of the United States and by Paragraph Four of Section Nine of Article I of the Constitution.

Thirteenth. Your orator also avers that if the said Corporation Tax so incorporated in said Act of Congress be held not to be a direct tax, but as denominated in the act, fallaciously, as your orator is advised and believes, "a special excise tax," or falls under any denomination of duties, imposts or excises or is any other than a direct tax, then its provisions are nevertheless unconstitutional, null and void in that they are not uniform throughout the United States, as is specifically and explicitly required in and by Section Eight of Article I of the Constitution of the United States as to all "duties, imposts and excises," and as is implicitly required by the Constitution of the United States and the principles of free government as to all taxes, so far as to prevent an arbitrary and unreasonable classification of persons to be subjected to any particular tax.

A. Your orator avers that the said Corporation Tax is not uniform as to property, class or subject in that it is imposed not

18 only on corporations like the defendant corporation created and organized under the Acts of Congress, but also on corporations created and organized entirely under the laws of the various states and made by those laws, persons resident in said states, having all the rights of natural persons and of citizenship in said states and subject to no visitatorial or other powers of the Federal Government or of the Congress of the United States (in respect to which they are legally in precisely the same relation as are natural persons), but is not imposed on other individuals or persons in said states or on co-partnerships or associations not having a capital stock represented by shares, who are carrying on and transacting the same or similar business under like conditions and in the same localities and having like property and net income.

B. The said Corporation Tax is not uniform even among corporations in that in every state and in almost all localities where the tax would be operative and notably so in the State of Illinois and City of Chicago, where the defendant corporation is situated, there are a great number of corporations, the net income of which computed as the Corporation Tax Law directs, amounts to less than $5,000 a year, and did not amount to such sum during the year 1909, and that said corporations are equally with natural persons

and co-partnerships exempt from said Corporation Tax, although it is imposed on other corporations doing similar business under like conditions and having an entire net income greater than $5,000.

C. The said Corporation Tax is not uniform even among corporations in that in almost every state and in almost all localities where the tax would be operative, there are a large number of corporations organized under state laws which derive their income entirely from dividends upon stock of other corporations, joint
19 stock companies, associations and insurance companies, subject to the said Corporation Tax and whose entire income was so derived during the year 1909, and that said corporations by the effect of the law are equally with natural persons and co-partnerships exempted from said Corporation Tax.

D. The said Corporation Tax is not uniform even among corporations, in that in almost every state and in almost all communities where the tax would be operative there are a large number of corporations, also organized under state laws, which derive part of their income from dividends upon stock of other corporations, joint stock companies, associations and insurance companies, subject to said Corporation Tax and part of whose income was so derived during the year 1909 and that the tax upon such corporations is calculated at a different rate from the tax imposed upon other corporations doing similar business under like conditions and having no part of their income derived from dividends upon stock of other corporations, joint stock companies, associations and insurance companies, subject to said Corporation Tax.

E. Your orator avers that the said Corporation Tax is not uniform in that its effect would be to lessen the income from dividends of the shareholders of such corporations as are subject thereto and thus operate as a Federal Income Tax on such persons, many of whom have no other income, while all other persons, resident of the United States, are exempted from any Federal Tax on incomes. Thus an Income Tax is imposed on a very small proportion of the population of the United States, from which all other persons are exempted.

F. The said Corporation Tax is not uniform in its effect on corporations alone even, because of the exemptions therein contained of all labor, agricultural or horticultural organizations, all fraternal beneficiary societies, orders or associations, operating under
20 the lodge system, domestic building and loan associations organized and operated exclusively for the mutual benefit of their members and all corporations and associations organized and operated exclusively for religious, charitable or educational purposes, no part of the net income of which enures to the benefit of any private stockholder or individual, and your orator shows that the said exemptions and classifications are arbitrary and unreasonable and based on no classification which is uniform or equitable, and that many other corporations which by the terms of the Corporation Tax Law would be subject to the corporation Tax are equally with those that are thus exempted organized and operated as fully for the mutual benefit of their members as those which are thus exempted.

G. Your orator further shows that if the Corporation Tax were held to be an excise tax and a tax or license fee upon the privilege of doing business as a corporation and thus exercising a corporate franchise, it would not be uniform throughout the United States, because the incidents, privileges, immunities, obligations and liabilities pertaining to a corporate franchise or its exercise are not the same in all the states, but vary widely between different states and even between different classes of corporations in the same state. Thus the shareholders of all banking corporations created by the State of Illinois and organized under the Statutes of Illinois, are by the constitution and laws of the State of Illinois, individually responsible and liable to its creditors over and above the amount of stock held by them respectively, to an amount equal to their respective shares so held for all liabilities accruing while they are such shareholders.

And your orator says that by the National Banking Law, the shareholders of the defendant Bank and the shareholders of
21 all national banks are individually responsible equally and ratably, but not for one another, for all contracts, debts and engagements of the Bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount of their shareholdings.

But your orator shows that no such individual liability of shareholders exists in Illinois, in the case of corporations not doing a banking business, and that there is no personal liability on the shareholders of such other corporations, to the creditors of said corporations beyond the amount of their investments in the capital stock.

And on information and belief your orator avers that in some of the states of the United States there is no personal liability beyond the amount of their shareholdings imposed by law on the shareholders of banking corporations created and organized under the laws of said states, and in others there is unlimited personal liability imposed on such shareholders.

Your orator therefore avers that as the privilege of doing business as a corporation—a corporate franchise—is a different thing in one state from that which it is in another and varies according to the legal requirements and enactments of the respective states which create the corporation and is a different thing as to a corporation like the defendant, created by the Federal Government under the National Banking Act from that which it is as to a corporation organized under state laws, and may be a different thing as to different corporations in the same state—a tax on the mere privilege of existing as a corporation and exercising a corporate franchise, is neither uniform as to the different states of the United States nor as to the corporations within each state.

H. And your orator further shows that in many other respects besides those specifically mentioned in this bill of complaint
22 the said Corporation Tax is not uniform as required by Section 8 of Article I of the Constitution of the United States.

Fourteenth. Your orator further shows, that if said Corporation Tax were held not to be a direct tax nor a tax on property or income, but to fall under some other denomination, and if it were also held to be uniform throughout the United States within the meaning and

intent of the Constitution of the United States, it must still be held to be unconstitutional and void as not within the power of Congress to enact and as interfering with the reserved rights and sovereignty of the several states, by which the great majority of corporations made subject to the tax were created, and in conflict particularly with the tenth article of the Amendments to the Constitution of the United States, which reserves to the states a power to grant acts of incorporation as an incident of their sovereignty.

Your orator shows that although called by Congress a special excise tax the Corporation Tax is not an excise tax.

An excise tax, as your orator is advised and believes, is an occupation tax upon the privilege or license to follow a particular occupation or do a particular kind or kinds of business, and not, as is the Corporation Tax, a tax upon the privilege of existing as a corporation and exercising a corporate franchise.

But your orator shows that whether or not the Corporation Tax can be properly regarded as an excise tax, it is a tax either
23 upon the privilege of existing as a corporation or upon the privilege of doing business in a corporate capacity and is in conflict with the Constitution of the United States because the supposed power of Congress to enact it involves the power of Congress to interfere with, control, impair, and destroy the power of the states to grant franchises of corporate capacity, and to interfere with, control, impair and destroy the value and purpose of the franchises and privileges which the states have full power to grant.

Your orator further shows that included in the class of corporations on which the Corporation Tax is imposed are a very great number of public service corporations in the various states which perform public or semi-public functions in the matter of supplying intrastate and intra-municipal transportation and in supplying water and light and other municipal necessities to municipalities in said states. These public service corporations have been in a great number of cases given the power of eminent domain by the state for the purpose of enabling them to carry out their public or semi-public functions and they have thus been respectively made the direct instrumentalities and agents of the states creating them with which Congress has no right to interfere.

And your orator represents that the inclusion of these corporations in the operation of the Corporation Tax Law would by itself render the same unconstitutional and void.

But your orator further shows that in a wider sense all corporate franchises and all rights granted by a state to exist as
24 corporate entities, are instrumentalities of that state in the exercise of its reserved powers and functions and cannot be constitutionally taxed or interfered with by the Congress of the United States.

Fifteenth. Your orator further shows that though denominated in the act an excise tax the Corporation Tax is in reality as he is advised a tax on the incomes of corporations and that as it is an income tax, its provisions are unconstitutional, null and void, in that they impose a tax upon the incomes of many corporations,

derived partly from the bonds of the United States and from the bonds of various states of the United States and from bonds of cities, counties and municipalities in said various states, which bonds are among the means and instrumentalities employed for carrying on the governments which issue them, and are not proper subjects of the taxing power of Congress. Said several states, and the cities, counties and municipalities therein, are independent of the general government of the United States and the respective bonds of the said states and of their governmental agencies, the counties, cities and municipalities therein, are, together with the power of the states to borrow in any form, exempt from federal taxation.

Your orator further shows that as he is informed and believes the bonds of the states, cities, counties and municipalities of the United States which are exempted from federal taxation under the
25 Constitution of the United States amount in the aggregate to a vast sum, of which a very large proportion are held by corporations on which the Corporation Tax purports to be imposed, and that the income and interest from said bonds constitute a considerable proportion of the net income of many of such corporations and that it was and is the intention of Congress and is essential and necessary to accomplish the purposes and general scope of the Corporation Tax to lay and collect such tax on the said income derived by corporations from such state, county and municipal bonds, and that such would be the effect of the said Corporation Tax if it were valid.

Sixteenth. Your orator further avers that the provisions of said Corporation Tax, incorporated in the Act of Congress as aforesaid, are unconstitutional, null and void in that they impair property rights vested prior to the passage of said act and in that they purport to impose a tax on the net income of corporations, which income accrued prior to August 5, 1909, the date on which said act became a law, or else purport to impose a tax on the privilege of doing business as a corporation prior to said August 5, 1909.

26 Seventeenth. Your orator further avers that the provisions of said Corporation Tax incorporated in said Act of Congress as aforesaid are unconstitutional, null and void in that all corporations thereby taxed may be deprived of their property without due process of law in violation of Article V, of the Amendments to the Constitution of the United States.

Eighteenth. Your orator further shows that the provisions of said Corporation Tax incorporated in said Act of Congress as aforesaid are unconstitutional, null and void in that all corporations thereby taxed may be compelled to disclose their private books and papers, in order to make them liable for a penalty or to forfeit their property, and in any event are obliged to make returns of their private business in such manner that they become public records, open to competing and hostile examination, although the said corporations making them may have no public functions nor be affected with a public interest. And special information obtained by the officers charged with the collection of the tax may be made public to all competitors or enemies of any corporation at the discretion of the

President of the United States, all of which provisions are in violation of Articles IV and V of the Amendments to the Constitution of the United States.

27 Nineteenth. Your orator further shows that this suit is brought in good faith and is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance and that he has duly requested the defendant Bank and its directors and each of them in writing to omit and refuse to pay and to refrain from paying said Corporation Tax and to contest the constitutionality of said act, and to refrain from voluntarily making lists, returns and statements to the Collector of Internal Revenue for the Northern District of Illinois (either for the year 1909 or for any subsequent year), and to apply to a court of competent jurisdiction to determine its liability under said act, and that a copy of said request is hereto annexed as Exhibit A, and made a part of this bill of complaint, but that said defendant Bank and a majority of its directors, after a meeting of the directors at which the matter and said request contained in Exhibit A were formally laid before them for action have, as your orator is informed and believes, refused and still refuse and intend omitting to comply with your orator's demand and, as your orator is informed and verily believes, have resolved and determined and intend to comply with all and singular the provisions of said Act of Congress and to pay said tax equal to one per cent of its net income for the year 1909, including therein its rents from real estate and its income from municipal bonds, and to comply also with the provisions of said act in all subsequent years.

28 A copy of the refusal of said defendant Bank to comply with the demand of your orator is hereto annexed as Exhibit B to this complaint.

Twentieth. Your orator further shows that if the defendant and its directors, as they propose and have declared their intention to do, pay said tax out of the net income of the defendant Bank, they will thereby diminish the assets of said Bank and lessen the dividends thereon and the value of all its shares, and that said payment will be a misapplication or diversion of its funds by an illegal payment out of its capital or profits; that the directors of said Bank are at law and in equity responsible for the disbursement of funds of the said Bank; that in that respect they occupy a fiduciary relation towards the said Bank and that any illegal payment of said funds is an improper diversion of said funds by the directors and a violation of their fiduciary duties to said Corn Exchange National Bank, your orator and other stockholders.

Twenty-first. Your orator further shows that the voluntary compliance with the provisions of said Corporation Tax so incorporated in said Act of Congress aforesaid, will expose the defendant Bank to the danger of a multiplicity of suits by its numerous shareholders, and that such numerous suits would work irreparable injury to the business of the Bank, and involve it in great and irreparable damage, to the irreparable damage also of your orator and all its shareholders.

29 Twenty-second. Your orator further shows that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of five thousand dollars, and arises under the Constitution and Laws of the United States, and involves the construction of the Constitution of the United States and the constitutionality and validity of an Act of Congress.

Twenty-third. And your orator shows that the actings, doings and pretenses of the defendants before set forth are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

Wherefore, and in consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable,

Your Orator prays:

I. That it may be adjudged and decreed that the said provisions imposing a Corporation Tax, incorporated in said Act of Congress approved August 5, 1909, are unconstitutional, null and void.

II. That the defendants be restrained from voluntarily complying with the provisions of said act and making the return or
30 statement above referred to and described, which they threaten to make, and from paying the tax aforesaid, either for the year 1909 or for any subsequent year in which the net income of the defendant Bank may exceed the sum of $5,000.

III. And that your orator may have such other or further or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of their knowledge, remembrance, information and belief, the said the Corn Exchange National Bank, under its corporate seal, and the said individual defendants, not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto;

May it please your Honors to grant unto your orator *a subpœna ad respondendum* issuing out of and under the seal of this Honorable court, to be directed to the said defendants, the Corn Exchange National Bank, Charles H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A.
31 Shedd, Frederick W. Crosby, Ernest A. Hammill and B. C. Sammons, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable court and then and there full, true, direct and perfect answer make to all and singular the

premises, and further to perform and abide by such further order and decree as to your Honors shall seem meet.

And also grant unto your orator an order to issue a writ of temporary or provisional injunction restraining the defendants as hereinbefore prayed until the further order of the court, and that on the hearing of this cause the said injunction be made perpetual.

And your orator as in duty bound will ever pray.

WILLIAM H. MINER,
PECKHAM, BROWN, PACKARD & WALSH,
Solicitors for Complainant.

EDWARD OSGOOD BROWN,
Of Counsel.

32 United States of America, Northern District of Illinois, Northern Division.

STATE OF ILLINOIS,
County of Cook, ss:

William H. Miner, being duly sworn, doth depose and say that he is the complainant in the foregoing bill of complaint; that he has read the bill and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief or as matters of law, and that as to those matters he believes it to be true.

WILLIAM H. MINER.

Subscribed and sworn before me this 19th day of January, 1910.
[SEAL.] CHARLES B. FOOTE,
Notary Public.

33 EXHIBIT A.

CHICAGO, *January* —, 1910.

To Charles H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill, and B. C. Sammons, Directors of the Corn Exchange National Bank of Chicago.

GENTLEMEN: I am a shareholder in the Corn Exchange National Bank and am informed that the Bank intends voluntarily to comply with the requirements of the provisions relating to a "Corporation Tax" contained in the 38th section of the Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes," enacted at the recent special session of Congress and approved by the President August 5, 1909, and commonly called the Tariff Act. I claim that the said provisions of said Act of Congress purporting to impose a "Corporation Tax" are unconsti-

tutional. As a shareholder in said Bank, I hereby protest against any action of the Bank and its directors in voluntarily complying with said "Corporation Tax" provisions and I request that said Bank and its directors shall refrain from voluntarily complying with any of said provisions and from voluntarily paying the "Corporation Tax" provided for therein (either for the year 1909 or any subsequent year), and from voluntarily making any returns or statements in compliance with said provision to the collector of internal revenue for this district.

I further request that said Bank and its directors shall
34 contest the constitutionality of said act and protect its shareholders and apply to a court of competent jurisdiction to determine its liability under the same, or take such steps as may be necessary to protect the rights of the Bank's shareholders.

Very truly yours, WILLIAM H. MINER.

35 EXHIBIT B.

CHICAGO, *January 12th*, 1910.

To William H. Miner, Chicago.

DEAR SIR: Referring to your letter of the 7th instant addressed to the directors of this Bank, we have to say that the Board of Directors at the meeting held this day considered the matter and we enclose a certified copy of the resolutions which they passed in relation to your request.

Yours very truly,

THE CORN EXCHANGE NATIONAL BANK OF CHICAGO,
By J. C. NEELY, *Sec'y.*

Enclosure.

CHICAGO, *January 12th*, 1910.

At a meeting duly and regularly called of the Board of Directors of The Corn Exchange National Bank, held this day, the following resolution was passed:

"*Resolved*, That the Board of Directors deem it inexpedient to comply with the demand of Mr. William H. Miner on the ground that the failure to comply with the provisions of the Corporation Tax Law would subject the Company to litigation with the United States."

I hereby certify that the foregoing is a true copy of a resolution passed by the Board of Directors of the Corn Exchange National Bank.

[CORPORATE SEAL.] J. C. NEELY, *Sec'y.*

(Endorsed:) Filed Jan. 19, 1910. H. S. Stoddard, clerk.

36 And on to-wit: the twenty-fourth day of January, 1910, come the defendants in said entitled cause by their solicitors and enter their appearance in said cause in words and figures following to-wit:

37 *Appearance of Defendants.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 29863.

WILLIAM H. MINER
vs.
THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill, and B. C. Sammons.

We hereby enter the appearance of each of the defendants in the above entitled cause, and of ourselves as their solicitors.

JUDAH, WILLARD, WOLF & REICHMANN,
Solicitors for Defendants.

NOBLE B. JUDAH,
Of Counsel.

(Endorsed:) Filed Jan. 24, 1910. H. S. Stoddard, Clerk.

38 And on the same day to-wit: the twenty-fourth day of January, 1910, come the defendants in said entitled cause by their solicitors and filed in the clerk's office of said Court their certain Demurrer to the bill of complaint in the words and figures following to-wit:

39 *Demurrer.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity. No. 29863.

WILLIAM H. MINER
vs.
THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill, and B. C. Sammons.

The Joint and Several Demurrer of Each and All of the Defendants in the Above Entitled Cause to the Bill of Complaint of William H. Miner, Complainant Therein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said Bill of Complaint

contained, to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur to the said Bill, and for cause of demurrer, show that the said complainant has not, in and by his said Bill, made or stated such a case as doth or ought to entitle him to any relief from or against these Defendants, or any of them, touching the matters contained in the said Bill, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said Bill of Complaint, these Defendants do demur
40 to the said Bill, and to all the matters and things therein contained, and they pray the judgment of this honorable Court, whether they, or either of them, shall be compelled to make any further or other answer to the said Bill; and they humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

THE CORN EXCHANGE NATIONAL BANK OF CHICAGO,
CHARLES H. WACKER,
MARTIN A. RYERSON,
CHAUNCEY J. BLAIR,
EDWARD B. BUTLER,
CHARLES J. HULBURD,
CLARENCE BUCKINGHAM,
BENJAMIN CARPENTER,
ISAAC G. LOMBARD,
WATSON F. BLAIR,
EDWIN G. FOREMAN,
CHARLES L. HUTCHINSON,
EDWARD A. SHEDD,
FREDERICK W. CROSBY,
ERNEST A. HAMILL,
B. C. SAMMONS,
Each by JUDAH, WILLARD, WOLF & REICHMANN, *Their Solicitors.*

NOBLE B. JUDAH,
Of Counsel.

I certify that in my opinion the foregoing demurrer of the defendants to the Bill of Complaint herein, is well founded in law and proper to be filed in the above cause.

NOBLE B. JUDAH,
Of Counsel for Defendants.

41 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

John C. Neely, being first duly sworn, on oath, deposes and says that he is the Secretary of The Corn Exchange National Bank of Chicago, one of the defendants in the above entitled cause; that he has read the foregoing demurrer to the Bill of Complaint in said

cause; and that the same is not interposed for the purpose of delaying said cause, or any proceedings therein.

JOHN C. NEELY.

Subscribed and sworn to, before me, this 24th day of January, A. D. 1910.

CHARLES B. FOOTE,
[SEAL.] *Notary Public.*

(Endorsed:) Filed Jan. 24, 1910. H. S. Stoddard, Clerk.

42 And on the same day to-wit: the twenty-fourth day of January, 1910, being one of the days of the regular December Term of said Court, 1909, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, Circuit Judge, appears the following entry to-wit:

43 *Decree of January 24, 1910, Sustaining Demurrer and Allowing Appeal.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29863. In Equity.

WILLIAM H. MINER, Complainant,

vs.

THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill, and B. C. Sammons, Defendants.

This cause having come on to be heard upon the Bill of Complaint and the Demurrer thereto heretofore filed herein, and the Court being fully advised in the premises,

It is ordered that the said demurrer be and the same is hereby sustained and that the Bill of Complaint of the Complainant herein be and the same is hereby dismissed at Complainant's costs.

Thereupon the above named Complainant states to the Court that in this case the constitutionality of a law of the United States is drawn in question and prays an appeal from said final decree, dismissing the Bill of Complaint herein, direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided. And the Court being fully advised in the premises, and an assignment of errors having been duly filed

It is ordered that the said appeal to the Supreme Court of the United States be and the same is hereby allowed as prayed for upon the Complainant filing his appeal bond in the usual form in the

penal sum of Five Hundred Dollars and the said defendants *not* admit in open court due notice of said appeal and duly waive service of any citations thereon.

44 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause by his solicitors and filed in the clerk's office of said Court his certain petition for appeal, in the words and figures following to-wit:

45 *Petition for Appeal.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29863. In Equity.

WILLIAM H. MINER, Complainant,
vs.
THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill and B. C. Sammons, Defendants.

The above named Complainant, conceiving himself to be aggrieved by the order or decree made and entered in the above entitled cause on January 24, A. D. 1910, dismissing the Bill of Complaint herein for want of equity, hereby appeals from said order or decree to the Supreme Court of the United States for the reasons specified in the Assignments of Error filed herein and prays that this appeal may be allowed and that a transcript of the record and all proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

PECKHAM, BROWN,
PACKARD & WALSH,
Counsel for Complainant.

(Endorsed:) Filed Jan. 24, 1910. H. S. Stoddard, Clerk.

46 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause by his solicitors and filed in the Clerk's office of said Court his certain assignment of errors in words and figures following to-wit:

47 *Assignment of Errors.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

No. 29863. In Equity.

WILLIAM H. MINER, Complainant,
vs.
THE CORN EXCHANGE NATIONAL BANK OF CHICAGO, CHARLES H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill and B. C. Sammons, Defendants.

Now comes William H. Miner, Complainant herein, and files the following Assignments of Error to the decree of the Circuit Court herein, upon which he relies for grounds of reversal on appeal.

1. The said Circuit Court erred in sustaining the demurrer of the defendants to the Bill of Complaint herein.

2. The said Circuit Court erred in dismissing the Bill of Complaint herein at the Complainant's costs.

3. The said Circuit Court erred in not over-ruling the demurrer herein and entering a decree in accordance with the prayer of the Complainant's bill.

WILLIAM H. MINER,
By PECKHAM, BROWN,
PACKARD & WALSH,
His Solicitors.

(Endorsed:) Filed Jan. 24, 1910. H. S. Stoddard, Clerk.

48 And on the same day to-wit: the twenty-fourth day of January, 1910, come the complainant in said entitled cause and filed in the clerk's office of said Court, in said entitled cause a certain Bond on appeal in words and figures following to-wit:

49 *Bond on Appeal.*

Know all men by these presents, That we, William H. Miner, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto The Corn Exchange National Bank of Chicago, Charles H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill and B. C. Sammons, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said The Corn Exchange National Bank of Chicago, Charles

H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill and B. C. Sammons, their certain attorneys, executors, administrators, successors, or assign; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals and dated this 24th day of January, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a term of the United States Circuit Court for the Northern District of Illinois, Eastern Division, in a suit depending in said Court, between William H. Miner, as complainant, and The Corn Exchange National Bank of Chicago, Charles H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter, Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A.
50 Hamill and B. C. Sammons, as defendants, a decree was rendered against the said William H. Miner, complainant, and the said William H. Miner, having prayed for an appeal to reverse said decree and the same having been allowed by said Circuit Court, and the issuance of a citation having been expressly waived in open court by the said defendants,

Now, the condition of the above obligation is such, that if the said William H. Miner shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. MINER. [SEAL.]
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
[SEAL.] By ARTHUR C. ARNOLD,
Agent & Attorney in Fact.

Approved by—
KOHLSAAT,
Circuit Judge.

Jan'y 24, 1910.

(Endorsed:) Filed Jan. 24, 1910. H. S. Stoddard, Clerk.

51 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, H. S. Stoddard, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record in said Court, in the cause entitled William H. Miner vs. The Corn Exchange National Bank of Chicago, Charles H. Wacker, Martin A. Ryerson, Chauncey J. Blair, Edward B. Butler, Charles H. Hulburd, Clarence Buckingham, Benjamin Carpenter,

Isaac G. Lombard, Watson F. Blair, Edwin G. Foreman, Charles L. Hutchinson, Edward A. Shedd, Frederick W. Crosby, Ernest A. Hamill, and B. C. Sammons, as the same appear from the original records and filed thereof, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District and Division, this twenty-fourth day of January, 1910.

[Seal of Circuit Court U. S., Northern Dist., Illinois, 1855.]

H. S. STODDARD, *Clerk,*
By JOHN H. R. JAMAR,
Chief Deputy Clerk.

Endorsed on cover: File No. 21,980. N. Illinois C. C. U. S. Term No. 754. William H. Miner, appellant, vs. The Corn Exchange National Bank of Chicago, Charles H. Wacker, Martin A. Ryerson, et al. Filed January 26th, 1910. File No. 21,980.

Supreme Court, U. S.
FILED.
JAN 28 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. ~~764~~ 412

WILLIAM H. MINER,

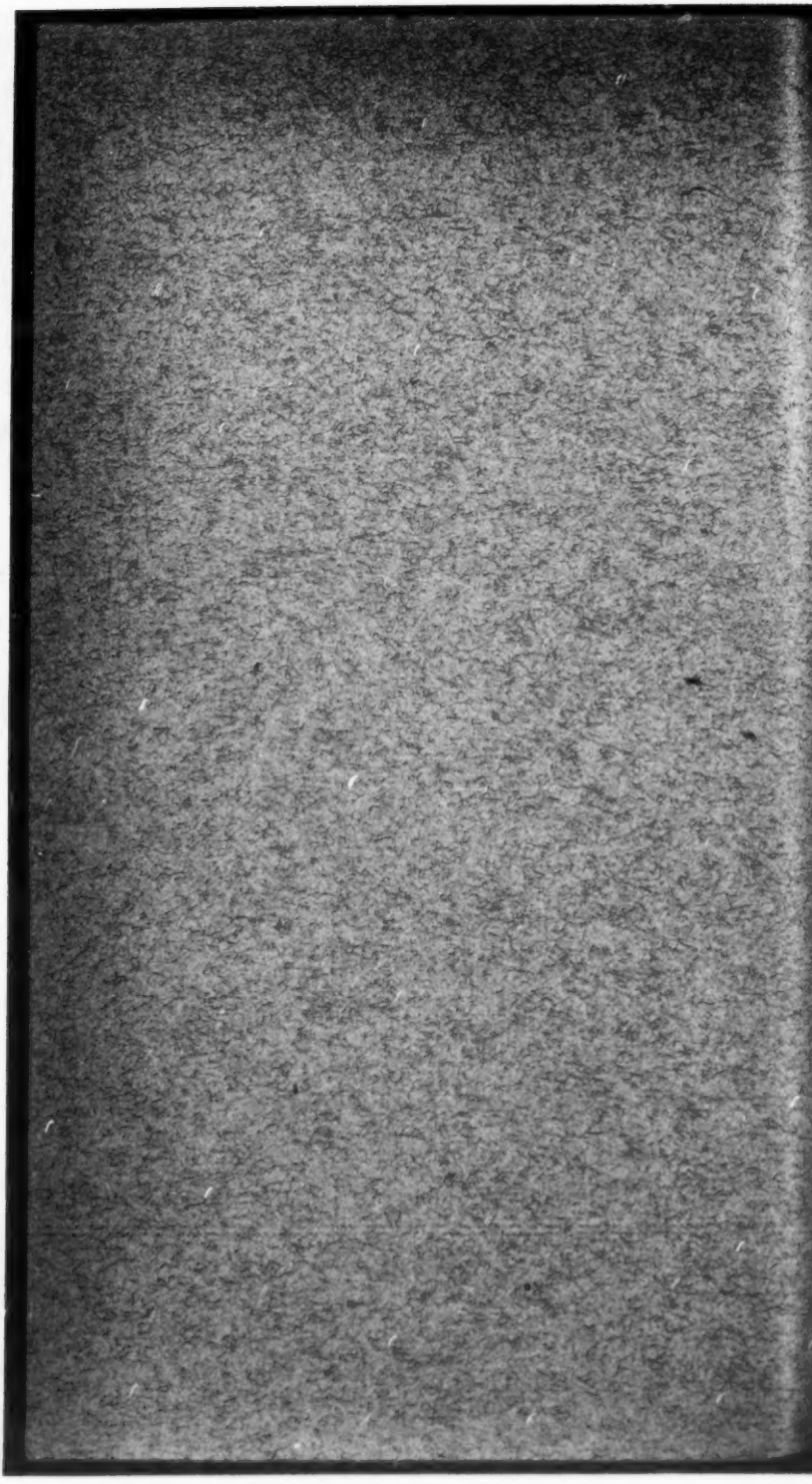
vs.

CORN EXCHANGE NATIONAL BANK ET AL.

MOTION TO ADVANCE.

ORVILLE PECKHAM,
EDWARD OSGOOD BROWN,
GEORGE PACKARD,
VINCENT J. WALSH,
Counsel for Appellant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.



Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 754.

WILLIAM H. MINER, APPELLANT,

vs.

CORN EXCHANGE NATIONAL BANK ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Motion to Advance Under Rule 26.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes William H. Miner, the appellant herein, and respectfully moves this honorable court that the above entitled cause may be advanced upon the docket of this court and set down for argument and hearing at an early date to be fixed by the court herein, and for grounds of said motion shows to the court as follows:

I.

In this case William H. Miner filed his bill against the Corn Exchange National Bank and its directors, to restrain the defendants from complying with the provisions

of an act of Congress of the United States entitled: "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, by making and filing with the collector of internal revenue for the first district of Illinois, prior to the 1st day of March, 1910, the statement or return required under the provisions of said act, and by paying on or before June 30, 1910, the tax provided for by said act upon the entire net income of the said defendant Corn Exchange National Bank. The bill further prayed that it might be adjudged and decreed that section 38 of said act, otherwise known and referred to as the Corporation Tax Act, should be adjudged to be unconstitutional and null and void.

II.

The defendants filed a general demurrer to this bill, and upon their motion the demurrer was sustained, the bill dismissed and an appeal to this court prayed and allowed.

III.

The facts as alleged in the bill show that the defendant is the owner of three hundred shares of the capital stock of the corporation of the par value aggregating $30,000; that the directors of the corporation have determined that it is liable to pay, and that they intend to pay for it to the United States on or before June 30, 1910, the tax provided by the act, and that it is their intention and purpose voluntarily to file with the collector of internal revenue the statement or return, provided for by said act, under oath, of its president, vice-president, or other principal officer, setting forth the assets and income of the corporation, as provided for by the

act in question; and that the directors have taken the position that in each successive year after 1909 they intend voluntarily to pay the amount of the tax provided for by the act.

IV.

The Corn Exchange National Bank of Chicago, as shown by the bill, is a corporation duly organized and carrying on business under the National Bank Act, under the provisions of which act it is authorized to exercise such powers as may be necessary to carry on the business of banking, among other things, by receiving deposits, buying and selling exchange, loaning money and issuing and circulating notes. It is further authorized under the act under which it is organized to purchase, hold and convey real estate necessary for the transaction of its business, or such as may be mortgaged or conveyed in satisfaction of debts to it.

The bill further shows that the bank is the owner of a lease-hold interest in the city of Chicago upon which it has erected a banking building, which building is of value of more than $2,500,000, and from which said bank derives, by way of rental from tenants therein, an income of not less than $90,000 per annum. It is further shown by the bill that the bank is the owner of bonds of the United States and of the United States Government Territorial bonds of the Phillipines and Hawaii in the aggregate amount of $1,700,000, from which it derives an income of about $44,000 annually.

V.

The bill alleges that the provisions of section 38 aforesaid, referred to as the Corporation Tax, are in conflict with the provisions of the Constitution of the United States, and are null and void for the reasons:

(1) The tax is a direct tax and is not apportioned

among the several States according to their population, as required by section 2, article 1, and paragraph 4 of section 9 of article 1 of the Constitution.

(2) If the tax is not a direct tax but can be held to be a duty, impost or excise, then the provisions of the law are unconstitutional as not being uniform, as required by section 8, article 1 of the Constitution of the United States.

(3) Even if the corporation tax were held not to be a direct tax, nor a tax on property or income, and were also held to be uniform throughout the United States, it is unconstitutional as not being within the power of Congress to enact, since it interferes with the reserved rights and sovereignty of the several States, by which State corporations were created, and is in conflict particularly with article 10 of the amendments to the Constitution of the United States.

VI.

The matters involved herein are of great and general public interest and importance, and unless an adjudication by this honorable court as to the constitutionality of the law in question is speedily obtained, a great number of corporations affected by the provisions of this act will pay the amount of the tax levied against them under a protest, and commence actions to recover the same, thereby involving the representatives of the United States Government in a multiplicity of suits.

VII.

This appellant is advised that a motion to advance under rule 26 was filed herein on January 24, 1910, by the appellant in the case of Flint *vs.* The Stone Tracy Company, No. 747 on the docket of this court. This last

mentioned case involves the constitutionality of the corporation tax law, but this appellant is advised that the questions raised by him in his bill of complaint as aforesaid are in many respects different from and raise other considerations than the considerations and questions raised in said Flint case with respect to the constitutionality if said act.

VIII.

This appellant therefore prays this honorable court that this case may be advanced upon the docket, under the provisions of rule 26 of this court, to be set down at an early date for argument and hearing.

A notice of this motion has been served upon counsel for the appellees and proof of service filed with the clerk of this court, and the solicitor-general of the United States has been notified that this motion would be submitted.

Respectfully submitted.

ORVILLE PECKHAM,
EDWARD OSGOOD BROWN,
GEORGE PACKARD,
VINCENT J. WALSH,
Counsel for Appellant.

January 28, 1910.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

WILLIAM H. MINER,
Appellant,

vs.

THE CORN EXCHANGE NATIONAL BANK OF CHICAGO AND OTHERS.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF THE CASE.

This cause, No. 754 on the docket of the court, is like the preceding one No. 753 (*Fred W. Smith, Appellant,* v. *The Northern Trust Company and others, Appellees*), an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois, sustaining a general demurrer to a bill in equity filed by the complainant, and dismissing the bill at complainant's costs. The two causes, *Smith* v. *The Northern Trust Company and Others* and *Miner* v. *The Corn Exchange National Bank and Others,* were begun together in the court

below. The same respective counsel represented the respective parties complainant and defendant in them, and they were heard, disposed of and appealed at the same time.

The allegations in the bills of the respective complainants do not differ, except in a very few particulars which we shall set out in the short brief and argument which we purpose herewith to submit.

It seems sufficient, therefore, in this statement, to do little more than to refer to the brief and argument filed by us in the preceding cause, *Smith* v. *The Northern Trust Company,* No. 753, and to say that in this case, as in that, the only question involved is the constitutionality of Section Thirty-Eight of the Act of Congress entitled "An Act to Provide Revenue, Equalize Duties, and Encourage Industries of the United States, and for Other Purposes," approved August 5, 1909, said section being commonly known as "The Corporation Tax Law" of the United States.

As the entitlement of the appeal shows, the principal defendant in this cause is a national bank.

The complainant in this cause is an owner of three hundred shares of the Corn Exchange National Bank of Chicago. He demanded of the directors of that Bank that they should refrain from voluntarily

making any return or voluntarily paying any tax under the provisions of the "Corporation Tax Law" on the ground of its unconstitutionality. The directors declined to accede to that request and announced their determination to do both.

The net income of the Bank for the year 1909, on which the tax would fall or by which it would be measured, was for that year more than $500,000. The Bank has real estate in the form of a leasehold interest for 99 years in land in Chicago, on which it has built a banking building, part of which it occupies itself and part of which it rents to various tenants. The leasehold and building belonging to the defendant Bank are worth $2,500,000, and the income derived therefrom by the defendant Bank amounts to not less than ninety thousand dollars per annum, after all taxes are paid. The Bank is the owner of United States bonds to the amount of $1,175,000 and of United States Government territorial bonds of the Philippines and Hawaii to the amount of $530,000, and derives an income of about $24,000 annually from its investments in bonds of the United States, and of about $20,000 annually from its investments in the said territorial bonds.

When the directors announced their determination voluntarily to make the returns and payment described, the complainant brought his bill against

the Bank and them for an injunction, setting up the foregoing facts and also alleging, as has been stated the same grounds for holding the law unconstitutional as were set forth in the suit of *Smith against The Northern Trust Company.* Of course, however, he could not, as did the complainant in that case, claim that the principal defendant was in any sense an instrumentality or agency of the State of Illinois.

In that particular alone is there any substantial difference between this cause and that of *Smith* v *The Northern Trust Company et al.*

Assignment of Errors.

The assignment of errors on the record are simply that the Circuit Court erred in sustaining the demurrer of the defendants; that it erred in dismissing the bill of complaint; and that it erred in not overruling the demurrer and entering a decree in accordance with the prayer of the bill.

This is equivalent to the particular ground on which we rely for reversal, which is, that Section 38 of the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage industries of the United States, and for other purposes," is unconstitutional, null and void for the reasons set forth in the bill, and that the court below should have so found and enjoined the defendants from complying with it as prayed.

BRIEF OF ARGUMENT.

This case differs from the case of *Smith* v. *The Northern Trust Company et al.*, immediately preceding it on the docket, only in the fact that the principal defendant is a national bank instead of a corporation created by the State of Illinois.

Therefore we adopt for this case the brief and argument in the *Northern Trust Company* case—pointing out in addition only that the Corporation Tax Law if invalid against the great mass of corporations intended to be affected by it, cannot be held valid as to national banks and other corporations created by federal authority.

A tax falling only on such corporations was not within the intention of Congress.

If it fails as to state-created corporations therefore, it must fail as to national banks.

Pollock v. *Trust Company,* 158 U. S., 601.
Pointdexter v. *Greenhow*, 114 U. S., 270.
Spraigue v. *Thomson,* 118 U. S., 90.
Warren v. *Charlestown,* 2 Gray, 84.

ARGUMENT.

As set forth in the statement of the case prefixed hereto, this cause differs so little from that of *Smith* v. *The Northern Trust Company and Others,* No. 753, immediately preceding it upon the docket and to be heard with it, that it would be wholly unjustifiable for us perfunctorily to repeat herein that which we have said in that cause. We refer, therefore, to the brief and argument filed in No. 753, in which, to the best of our ability, we have set forth our reasons for holding the Corporation Tax an invalid enactment and adopt that brief and argument herein.

We cannot claim that there is any reason for holding the Corporation Tax invalid against National Banks generally, or against this particular Bank, additional to those which we have urged against its validity as applied to all corporations. On grounds of expediency and abstract justice, however, especial reasons for holding it a most ill-advised and unfortunate imposition on these fiscal agencies of the United States do exist, and it was those reasons undoubtedly which led to the introduction into the executive message which was the genesis of this tax, of the recommendation to except from it Na-

tional Banks (correctly characterized as "otherwise taxed") a recommendation, however, not adopted. The National Banks are indeed "otherwise" taxed. They pay to the United States a tax each half year on upon the average amount of their notes in circulation. But this is the very least of their burdens. They are subject to the taxation directly of their real estate by state, county and municipal authority, and indirectly, in Illinois at least, and we presume substantially in the same manner in all the states, by the taxation of their shares of capital stock in the hands of the stockholders, of which taxation they are in effect compelled by law to become collectors. The difference in practical effect between this taxation and the taxation of the banks directly is nothing except as the allowed and pursued method gives greater certainty of assessment and collection.

These taxes, except the federal tax on the note circulation, it is true, are theoretically, taxes which individual citizens of the taxing state must also pay, but were it a matter which could be properly laid before the court, there would be no difficulty in showing definitely that which, as a matter of common report, we all know to be true, that because of the absolute publicity which has to be given to the financial condition of National Banks, they

are really subjected to a degree and rate of local taxation in comparison with other tax payers which practically renders them in many communities the main support of the municipal treasury.

National Banks, moreover, are compelled to base their circulation,—the circulation which is semi-annually taxed,—on Government bonds, for which, therefore, they furnish the principal market. Those bonds were issued in every case under laws which exempted them from taxation. They were purchased under that promise. If this Corporation Tax Law is valid, they will be taxed. No intellectual ingenuity can disguise the fact that under this law from the income from them is to be deducted one per cent to go to the Government which issued them under the provision that they should not be taxed. The patent injustice of this led to a question on the construction of the law and the Treasury Department is said to have entertained doubts as to the propriety of the inclusion of these bonds within the sources of the income which is to be, as the defenders of the law claim, the mere "yard stick" or measure for the "privilege" or "license" fee, which they declare the Corporation Tax to be.

But the Department of Justice ruled that the income from the bonds was income which must be considered in making up the return and computing

the payment. No other ruling would have been at all consistent with the contention of the Government absolutely necessary to sustain the tax; that it is not an income tax or a tax on incomes, but an excise tax measured by something on which it does not fall.

All this, however, would have little to do with our argument for this court were we not desirous of emphasizing the proposition, that although we have no *additional* reason to offer in behalf of National Banks against the validity of the Corporation Tax, yet that every reason urged by us in that behalf, in the case of *Smith* v. *The Northern Trust Company*, is fully applicable to its validity as against National Banks.

Because National Banks are the creations of Congress and because Congress, as distinguished from the states, may pass laws impairing the obligation of contracts, we should hesitate to claim that Congress had not the right to impose a tax either on their privilege of existence or on their privilege of doing business, as well as on their property.

If the Corporation Tax had been laid therefore *only* on National Banks, there would have been but two questions to answer in relation to its validity; Is it a direct tax and therefore invalid because unapportioned? If not, is it "uniform" under the

implicit and explicit provisions of the Constitution?

There would not have been the further objection that Congress had attempted to tax the powers, instrumentalities and agencies of the states.

But Congress did not lay the Corporation Tax on National Banks alone, and the only purpose with which we have alluded to the injustice and inexpediency of placing this additional burden on them, is to call attention to the utter impossibility of entertaining the theory that Congress would ever have passed this "entire scheme" of taxation, had it been deemed possible that it could fall on National Banks alone.

We do not know—and we do not suppose—that the Department of Justice will make any claim that if the law should fail against corporations created by the states it could be held good against National Banks because they are creations of the federal government.

But it was to avoid any possible contingency that the court (if the case of a National Bank was not before it) might place a decision on the law on grounds which would leave undecided its effect on such banks that led Mr. Miner, the complainant in this suit, to follow Mr. Smith's proceeding against the Northern Trust Company, with another against a National Bank.

Knowing of Mr. Smith's protest, request and denial, and of the bill which he was preparing, Mr. Miner would but for this consideration have been quite content to have allowed the issue of that case to determine the extent of his own rights against the Corn Exchange National Bank.

And so now, he is content to adopt the argument made in that case as his contentions in the present one, supplementing it only by insisting that as nothing could be more fanciful than to suppose that Congress would have ever enacted this tax had all state-created corporations been eliminated, leaving hardly any corporations to be taxed but National Banks, there is an added significance given in this case to the authorities which in *Smith* v. *The Northern Trust Company* we cited to show that this scheme of taxation—if it failed in any material part—must fail altogether.

Pollock v. *Trust Company*, 158 U. S., 601.
Pointdexter v. *Greenhow*, 114 U. S., 270.
Spraigue v. *Thomson*, 118 U. S., 90.
Warren v. *Charlestown*, 2 Gray, 84.

As we have said on pages 87 and 88 of our argument in *Smith* v. *Miner:*

> "The Corporation Tax as attested by all the arguments of its advocates, by the common knowledge that without the inclusion of the corporations which furnish transportation, water,

> light, intelligence transmission, or perform other public or semi-public functions, the revenue to be expected from the tax would be relatively insignificant, and by the internal evidence of its provisions for publicity, which in the case of merely private business enterprises can find no plausible pretext of justification, was perhaps framed more for the purpose of falling on public service corporations than on any others. The inclusion of these corporations within the operation of the law is part of the warp and woof of the law constituting one entire scheme of taxation. If these corporations cannot be constitutionally taxed under it, therefore we submit the entire scheme must fail, and the law as a whole be declared invalid on the doctrine declared in the *Pollock* cases."

If the law is to be declared invalid against all other corporations except those created by the action of the federal government, this line of argument has, of course, still stronger force. The condition of National Banks is already subject to publicity in a fuller sense even than is required by this law. They form a relatively small portion of the corporations taxed. They were included under it against the original recommendation of its framers. They should and would be rather the favored than the especially burdened corporations of the jurisdiction which created them. They are already heavily taxed. No presumption can possibly be indulged that this law would have been passed had it expressly been limited to them.

Therefore all that we have urged in *Smith* v. *The*

Northern Trust Company et al. as to the invalidity of the law because it is laid on franchises and privileges which are the powers, instrumentalities and agencies of the states, is in point in this case as well as in that. If the law fails for those reasons against other corporations it must fail against National Banks, because it has thus failed against such other corporations.

If the Corporation Tax is held to be a direct income tax as to real estate and invested personalty, it plainly falls in the case of National Banks most directly on the income from those sources. Invested personalty in government and in municipal bonds, as well as in all other kinds of personalty, is the greatest source of their income.

If the tax is not direct, but an "excise," it cannot be good against National Banks and invalid as to other corporations, for Congress never intended to pass any law which should thus discriminate against its own creations.

Repeating therefore our request that in the consideration of this cause the court should consider our brief and argument in No. 753—*Smith* v. *The Northern Trust Company et al.*—we refrain from a renewed discussion of the law.

EDWARD OSGOOD BROWN,
Of Counsel.

GEORGE PACKARD and
VINCENT J. WALSH,
Also of Counsel.

PECKHAM, BROWN, PACKARD & WALSH,
Solicitors for Complainant.

Office Supreme Court U. S.
FILED
JAN 16 1911
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

No. 954 412

WILLIAM H. MINER,
Appellant,

vs.

THE CORN EXCHANGE NATIONAL BANK OF CHICAGO AND OTHERS,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

EDWARD OSGOOD BROWN,
Of Counsel for Appellant.

GEORGE PACKARD AND
VINCENT J. WALSH,
Also of Counsel.

PECKHAM, BROWN, PACKARD & WALSH,
Solicitors.

Geo. Rhinestein Co., Printers, Chicago.

(21980)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

No. 754.

WILLIAM H. MINER,
Appellant,

vs.

THE CORN EXCHANGE NATIONAL BANK OF CHICAGO AND OTHERS,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

This cause, No. 754 on the docket of the court, is like the preceding one No. 753 (*Fred W. Smith, Appellant,* v. *The Northern Trust Company and others, Appellees*), an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois, sustaining a general demurrer to a bill in equity filed by the complainant, and dismissing the bill at complainant's costs. The two causes, *Smith* v. *The Northern Trust Company and Others* and *Miner* v. *The Corn Exchange National Bank and Others*, were begun together in the court below. The

same respective counsel represented the respective parties complainant and defendant in them, and they were heard, disposed of and appealed at the same time.

The allegations in the bills of the respective complainants do not differ, except in a very few particulars which we shall set out in the short brief and argument which we purpose herewith to submit.

It seems sufficient, therefore, in this statement, to do little more than to refer to the brief and argument filed by us in the preceding cause, *Smith* v. *The Northern Trust Company*, No. 753, and to say that in this case, as in that, the only question involved is the constitutionality of Section Thirty-Eight of the Act of Congress entitled "An Act to Provide Revenue, Equalize Duties, and Encourage Industries of the United States, and for Other Purposes," approved August 5, 1909, said section being commonly known as "The Corporation Tax Law" of the United States.

As the entitlement of the appeal shows, the principal defendant in this cause is a national bank.

The complainant in this cause is an owner of three hundred shares of the Corn Exchange National Bank of Chicago. He demanded of the directors of that Bank that they should refrain from voluntarily mak-

ing any return or voluntarily paying any tax under the provisions of the "Corporation Tax Law" on the ground of its unconstitutionality. The directors declined to accede to that request and announced their determination to do both.

The net income of the Bank for the year 1909, on which the tax would fall or by which it would be measured, was for that year more than $500,000. The Bank has real estate in the form of a leasehold interest for 99 years in land in Chicago, on which it has built a banking building, part of which it occupies itself and part of which it rents to various tenants. The leasehold and building belonging to the defendant Bank are worth $2,500,000, and the income derived therefrom by the defendant Bank amounts to not less than ninety thousand dollars per annum, after all taxes are paid. The Bank is the owner of United States bonds to the amount of $1,175,000 and of United States Government territorial bonds of the Philippines and Hawaii to the amount of $530,000, and derives an income of about $24,000 annually from its investments in bonds of the United States, and of about $20,000 annually from its investments in the said territorial bonds.

When the directors announced their determination voluntarily to make the returns and payment described, the complainant brought his bill against

the Bank and them for an injunction, setting up the foregoing facts and also alleging, as has been stated, the same grounds for holding the law unconstitutional as were set forth in the suit of *Smith against The Northern Trust Company.* Of course, however, he could not, as did the complainant in that case, claim that the principal defendant was in any sense an instrumentality or agency of the State of Illinois.

In that particular alone is there any substantial difference between this cause and that of *Smith* v. *The Northern Trust Company et al.*

Assignment of Errors.

The assignment of errors on the record are simply that the Circuit Court erred in sustaining the demurrer of the defendants; that it erred in dismissing the bill of complaint; and that it erred in not overruling the demurrer and entering a decree in accordance with the prayer of the bill.

This is equivalent to the particular ground on which we rely for reversal, which is, that Section 38 of the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties and encourage industries of the United States, and for other purposes," is unconstitutional, null and void for the reasons set forth in the bill, and that the court below should have so found and enjoined the defendants from complying with it as prayed.

BRIEF OF ARGUMENT.

This case differs from the case of *Smith* v. *The Northern Trust Company et al.*, immediately preceding it on the docket, only in the fact that the principal defendant is a national bank instead of a corporation created by the State of Illinois.

Therefore we adopt for this case the brief and argument in the *Northern Trust Company* case—pointing out in addition only that the Corporation Tax Law if invalid against the great mass of corporations intended to be affected by it, cannot be held valid as to national banks and other corporations created by federal authority.

A tax falling only on such corporations was not within the intention of Congress.

If it fails as to state-created corporations therefore, it must fail as to national banks.

Pollock v. *Trust Company*, 158 U. S., 601.
Pointdexter v. *Greenhow*, 114 U. S., 270.
Spraigue v. *Thomson*, 118 U. S., 90.
Warren v. *Charlestown*, 2 Gray, 84.

ARGUMENT.

As set forth in the statement of the case prefixed hereto, this cause differs so little from that of *Smith* v. *The Northern Trust Company and Others*, No. 753, immediately preceding it upon the docket and to be heard with it, that it would be wholly unjustifiable for us perfunctorily to repeat herein that which we have said in that cause. We refer, therefore, to the brief and argument filed in No. 753, in which, to the best of our ability, we have set forth our reasons for holding the Corporation Tax an invalid enactment and adopt that brief and argument herein.

We cannot claim that there is any reason for holding the Corporation Tax invalid against National Banks generally, or against this particular Bank, additional to those which we have urged against its validity as applied to all corporations. On grounds of expediency and abstract justice, however, especial reasons for holding it a most ill-advised and unfortunate imposition on these fiscal agencies of the United States do exist, and it was those reasons undoubtedly which led to the introduction into the executive message which was the genesis of this tax, of the recommendation to except from it National

Banks (correctly characterized as "otherwise taxed") a recommendation, however, not adopted. The National Banks are indeed "otherwise" taxed. They pay to the United States a tax each half year on upon the average amount of their notes in circulation. But this is the very least of their burdens. They are subject to the taxation directly of their real estate by state, county and municipal authority, and indirectly, in Illinois at least, and we presume substantially in the same manner in all the states, by the taxation of their shares of capital stock in the hands of the stockholders, of which taxation they are in effect compelled by law to become collectors. The difference in practical effect between this taxation and the taxation of the banks directly is nothing except as the allowed and pursued method gives greater certainty of assessment and collection.

These taxes, except the federal tax on the note circulation, it is true, are theoretically, taxes which individual citizens of the taxing state must also pay, but were it a matter which could be properly laid before the court, there would be no difficulty in showing definitely that which, as a matter of common report, we all know to be true, that because of the absolute publicity which has to be given to the financial condition of National Banks they are really subjected to a degree and rate of local taxa-

tion in comparison with other tax payers which practically renders them in many communities the main support of the municipal treasury.

National Banks, moreover, are compelled to base their circulation,—the circulation which is semi-annually taxed,—on Government bonds, for which, therefore, they furnish the principal market. Those bonds were issued in every case under laws which exempted them from taxation. They were purchased under that promise. If this Corporation Tax Law is valid, they will be taxed. No intellectual ingenuity can disguise the fact that under this law from the income from them is to be deducted one per cent to go to the Government which issued them under the provision that they should not be taxed. The patent injustice of this led to a question on the construction of the law and the Treasury Department is said to have entertained doubts as to the propriety of the inclusion of these bonds within the sources of the income which is to be, as the defenders of the law claim, the mere "yard stick" or measure for the "privilege" or "license" fee, which they declare the Corporation Tax to be.

But the Department of Justice ruled that the income from the bonds was income which must be considered in making up the return and computing

the payment. No other ruling would have been at all consistent with the contention of the Government absolutely necessary to sustain the tax; that it is not an income tax or a tax on incomes, but an excise tax measured by something on which it does not fall.

All this, however, would have little to do with our argument for this court were we not desirous of emphasizing the proposition, that although we have no *additional* reason to offer in behalf of National Banks against the validity of the Corporation Tax, yet that every reason urged by us in that behalf, in the case of *Smith* v. *The Northern Trust Company,* is fully applicable to its validity as against National Banks.

Because National Banks are the creations of Congress and because Congress, as distinguished from the states, may pass laws impairing the obligation of contracts, we should hesitate to claim that Congress had not the right to impose a tax either on their privilege of existence or on their privilege of doing business, as well as on their property.

If the Corporation Tax had been laid therefore *only* on National Banks, there would have been but two questions to answer in relation to its validity; Is it a direct tax and therefore invalid because unapportioned? If not, is it "uniform" under the im-

plicit and explicit provisions of the Constitution?

There would have been the further objection that Congress had attempted to tax the powers, instrumentalities and agencies of the states.

But Congress did not lay the Corporation Tax on National Banks alone, and the only purpose with which we have alluded to the injustice and inexpediency of placing this additional burden on them, is to call attention to the utter impossibility of entertaining the theory that Congress would ever have passed this "entire scheme" of taxation, had it been deemed possible that it could fall on National Banks alone.

We do not know—and we do not suppose—that the Department of Justice will make any claim that if the law should fail against corporations created by the states it could be held good against National Banks because they are creations of the federal government.

But it was to avoid any possible contingency that the court (if the case of a National Bank was not before it) might place a decision on the law on grounds which would leave undecided its effect on such banks that led Mr. Miner, the complainant in this suit, to follow Mr. Smith's proceeding against the Northern Trust Company, with another against a National Bank.

Knowing of Mr. Smith's protest, request and denial, and of the bill which he was preparing, Mr. Miner would but for this consideration have been quite content to have allowed the issue of that case to determine the extent of his own rights against the Corn Exchange National Bank.

And so now, he is content to adopt the argument made in that case as his contentions in the present one, supplementing it only by insisting that as nothing could be more fanciful than to suppose that Congress would have ever enacted this tax had all state-created corporations been eliminated, leaving hardly any corporations to be taxed but National Banks, there is an added significance given in this case to the authorities which in *Smith* v. *The Northern Trust Company* we cited to show that this scheme of taxation—if it failed in any material part —must fail altogether.

Pollock v. *Trust Company*, 158 U. S., 601.
Pointdexter v. *Greenhow*, 114 U. S., 270.
Spraigue v. *Thomson*, 118 U. S., 90.
Warren v. *Charlestown*, 2 Gray, 84.

As we have said on pages 87 and 88 of our argument in *Smith* v. *The Northern Trust Co.*:

> "The Corporation Tax as attested by all the arguments of its advocates, by the common knowledge that without the inclusion of the corporations which furnish transportation, water,

light, intelligence transmission, or perform other public or semi-public functions, the revenue to be expected from the tax would be relatively insignificant, and by the internal evidence of its provisions for publicity, which in the case of merely private business enterprises can find no plausible pretext of justification, was perhaps framed more for the purpose of falling on public service corporations than on any others. The inclusion of these corporations within the operation of the law is part of the warp and woof of the law constituting one entire scheme of taxation. If these corporations cannot be constitutionally taxed under it, therefore we submit the entire scheme must fail, and the law as a whole be declared invalid on the doctrine declared in the *Pollock* cases."

If the law is to be declared invalid against all other corporations except those created by the action of the federal government, this line of argument has, of course, still stronger force. The condition of National Banks is already subject to publicity in a fuller sense even than is required by this law. They form a relatively small portion of the corporations taxed. They were included under it against the original recommendation of its framers. They should and would be rather the favored than the especially burdened corporations of the jurisdiction which created them. They are already heavily taxed. No presumption can possibly be indulged that this law would have been passed had it expressly been limited to them.

Therefore all that we have urged in *Smith* v. *The*

Northern Trust Company et al. as to the invalidity of the law because it is laid on franchises and privileges which are the powers, instrumentalities and agencies of the states, is in point in this case as well as in that. If the law fails for those reasons against other corporations it must fail against National Banks, because it has thus failed against such other corporations.

If the Corporation Tax is held to be a direct income tax as to real estate and invested personalty, it plainly falls in the case of National Banks most directly on the income from those sources. Invested personalty in government and in municipal bonds, as well as in all other kinds of personalty, is the greatest source of their income.

If the tax is not direct, but an "excise," it cannot be good against National Banks and invalid as to other corporations, for Congress never intended to pass any law which should thus discriminate against its own creations.

Repeating therefore our request that in the consideration of this cause the court should consider our brief and argument in No. 753—*Smith* v. *The Northern Trust Company et al.*—we refrain from a renewed discussion of the law.

EDWARD OSGOOD BROWN,
Of Counsel.

GEORGE PACKARD and
VINCENT J. WALSH,
Also of Counsel.

PECKHAM, BROWN, PACKARD & WALSH,
Solicitors for Complainant.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.10

No. ~~757~~ 415

CEDAR STREET COMPANY, APPELLANT,

vs.

PARK REALTY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JANUARY 28, 1910.

(21,983)

(21,983)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 757.

CEDAR STREET COMPANY, APPELLANT,

vs.

PARK REALTY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 31, 1910.

1 *Subpœna.*

The President of the United States of America to Park Realty Company, Greeting:

[L. S.]

You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of March, A. D. 1910 wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Cedar Street Company and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of Two Hundred and Fifty Dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 26th day of January, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and thirty-fourth.

JOHN A. SHIELDS, *Clerk.*

DAVIES, STONE & AUERBACH,
Solicitors for Complainant.

The Defendant is required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of March, 1910, or the bill will be taken *pro confesso* against it.

J. A. S., *Clerk.*

2 I hereby certify, That on the 26th day of January, 1910, at the City of New York, in my district, I served the within Subpœna in Equity upon the within-named Defendant Park Realty Company by exhibiting to Samuel E. Jacobs, as Treasurer of said Co. at No. 135 B'way, N. Y. City the within original, and at the same time leaving with him a copy thereof.

WM. HENKEL,
United States Marshal,
Southern District of New York.

Dated Jan'y 26, 1910.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jan. 26, 1910, John A. Shields, Clerk.

3 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Defendant.

To the Judges of the Circuit Court of the United States for the Southern District of New York:

Cedar Street Company, a corporation and citizen of the State of New York, having its principal place of business in the Borough of Manhattan, in the City of New York, and Southern District of New York, brings this its bill, against Park Realty Company, a corporation and citizen of the State of New York, having its principal place of business in the Borough af Manhattan in the City of New York and the Southern District of New York, in its own behalf and on behalf of any and all of the stockholders of the defendant Park Realty Company who may join in the prosecution and contribute to the expense of this suit; and thereupon your orator complains and says:

First. That your orator is, and at all the times hereinafter mentioned, was a corporation duly organized and existing under
4 and by virtue of the Laws of the State of New York, and a citizen thereof, having its principal place of business at No. 11[illegible] Broadway, in the Borough of Manhattan, City of New York and Southern District of New York.

Second. Your orator further shows that the defendant Park Realty Company is, and at all the times hereinafter mentioned, was a corporation duly organized and existing under and by virtue of the Laws of the State of New York, and a citizen of the State of New York, having its principal place of business at No. 135 Broadway in the Borough of Manhattan, City of New York, and Southern District of New York.

Third. Your orator further shows that by the certificate of incorporation and by-laws of the said company the general control of the business and affairs of the said company is entrusted to and conferred upon the directors thereof as a board, acting by the vote of a majority of directors at a meeting thereof.

Fourth. Your orator further shows that your orator is, and at all the times hereinafter mentioned, was duly authorized by its certificate of incorporation to purchase, hold and sell bonds, stocks or investments of any kind, and that your orator is, and at all the times hereinafter mentioned, was a stockholder of record of the defendant Park Realty Company and a holder of 1,000 shares of the preferred capital stock of said Park Realty Company of the par value of $100 each.

Fifth. Your orator further shows that the defendant Park Realty

Company is, and at all the times hereinafter mentioned, was duly authorized by its certificate of incorporation, granted pursuant to the Laws of the State of New York, to purchase or otherwise
5 acquire, hold, own, maintain, work, develop, sell, convey, mortgage or otherwise dispose of real estate and real property and any interest and rights therein; generally to purchase, take on lease or in exchange, hire or otherwise acquire any real and personal property, and any rights or privileges which the company may think necessary or convenient for the purpose of its business; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses or warehouses; to make, enter into, perform and carry out contracts for constructing, altering, decorating, maintaining, furnishing, fitting up and improving buildings of every sort and kind; to advance money to and enter into contracts and arrangements of all kinds with builders, property owners and others; to carry on in all their respective branches, the businesses of builders or contractors; to purchase for investment or re-sale, and to sell houses, lands, real property of all kinds, and any interest therein, and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and any other property, whether real or personal, to carry on any or all of the businesses hereinabove specified.

That said Park Realty Company is duly authorized to issue $500,000 of capital stock of which $225,000 or 2,250 shares of the par value of $100 each is preferred stock and $275,000 or 2,750 shares of the par value of $100 each is common stock and said company pursuant to such authority has issued and there is now outstanding $206,000 of preferred stock and $206,000 of common stock. That dividends have been declared and paid upon the said issued preferred stock for the past seven years, and that no dividends have been declared or paid upon said common stock.

Sixth. Your orator further shows that pursuant to the authority granted by its certificate of incorporation as aforesaid, the
6 defendant Park Realty Company has acquired and is the owner of a parcel of real estate, situate, lying and being at the southeast corner of 63d Street and Madison Avenue, in the Borough of Manhattan, City of New York, and Southern District of New York, together with the building erected thereon, and which is known as the Hotel Leonori, which said real property is, and at all the times hereafter mentioned, was leased for a term of twenty-one years to one Charles Leonori at the specified annual rental of $55,000, which said lease expires September 30, 1914. That said real property is subject to a mortgage to the Bowery Savings Bank of the City of New York to secure the repayment of $500,000 with interest at the rate of 4½% per year. That said defendant Park Realty Company is engaged in no other business except the management and leasing of the real property aforesaid, wholly within the State of New York, as aforesaid, and is not engaged in commerce with foreign nations or among the several States or with the Indian tribes, and derives no other or further income except from the rental of its said real property as aforesaid, and has no assets except said

real property, and the income therefrom. That the defendant Park Realty Company is solvent and the net income of said corporation, computed in accordance with the Act of Congress hereinafter mentioned, for the calendar year 1909, is and will be in excess of $5,000 and is and will be at least the sum of $35,000.

Seventh. Your orator further shows that by section 38 of Chapter 6 of the Acts of the First Session of the Sixty-first Congress, which Act became a law August 5, 1909, and which is popularly
7 known as the "Tariff Act", it is provided that every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or of any State or Territory of the United States, or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country, and engaged in business in any State or Territory of the United States, or in Alaska, or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such company, equivalent to one per centum upon the entire net income over and above Five thousand dollars, received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other companies subject to the tax thereby imposed; or, if organized under the laws of any foreign country, upon the amount of net income over and above Five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other companies, subject to the tax thereby imposed.

It is provided by said Act that such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rental or franchise payments, required to be made as a condition to the continued use or pos-
8 session of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any

State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies, or associations, or insurance companies, subject to the tax thereby imposed.

The provisions of said Act are similar with regard to companies organized under the laws of a foreign country, except that in such case the items of income and expenditure are confined to the business transacted by such companies within the United States, Alaska, or the District of Columbia.

From the net income so computed the further sum of $5,000 is to be deducted and the remainder is the amount upon which the tax is to be computed.

From the provisions of said Act are specifically exempted,
9 labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders, and associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, and any corporation and association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

To the end of arriving at the net income taxed as aforesaid, each of the said companies subject to said tax is required by said Act on or before the first day of March, 1910, and the first day of March in each year thereafter, to make a true and accurate return under the oath or affirmation of its proper officers, to the Commissioner of Internal Revenue of the district in which such corporation has its principal place of business, or, in the case of a corporation organized under the laws of a foreign country, at the place where it does its principal business in the United States, for the calendar year, of the total amount of the paid up capital stock of such company, the total amount of the bonded and other indebtedness of such Company, the gross amount of the income of such Company, the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such Company, the total amount of losses actually sustained by it and the depreciation of its property, the amount of interest paid by it on its bonded or other indebtedness, to an amount of such bonded and other indebtedness not exceeding
the paid up capital stock of such Company, and other matters
10 pertaining to the business and financial condition of such corporation, and the income received by it, which said return is required to be transmitted to the Commissioner of Internal Revenue, who is empowered and required thereupon to assess the tax to which such Company is liable, on or before the first day of June in each successive year, and said tax must be paid by such Company on or before the 30th day of June in said year.

When such assessment is made, the aforesaid return is to be

filed in the office of the Commissioner of Internal Revenue, and constitute a public record open to inspection as such. The failure to make such return as aforesaid is by said Act attended with divers penalties, and if no such return is made, or if the Commissioner of Internal Revenue, in his own judgment, has ground to believe that such return is incorrect then such Commissioner is authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such Company, and to require the attendance of any officer or employee of such Company, and to take his testimony with reference to the matters required to be included in such return, with power to administer oaths, and to require the production of books and papers, and jurisdiction is conferred upon the Circuit and District Courts of the United States to compel such attendance before such Commissioner and the production of such books and papers.

Your orator avers that the defendant Park Realty Company comes within the terms and purview of said act and by the provisions of said act it is sought to require said company to make such returns and to impose such taxes upon said company.

11 Eighth. Your orator further shows that the said defendant Company and its directors controlling its affairs intend voluntarily in the future from year to year to comply with the said provisions with respect to making returns of net income and paying taxes imposed upon the carrying on or doing business by such corporation contained in said Act of the Congress of the United States, and that the said defendant is about to made a return of and with respect to the net income of said corporation for the year 1909, pursuant to said Act and to pay such tax upon the said net income as may be imposed upon such corporation by the Commissioner of Internal Revenue in accordance with said Act, and that the said defendant will from time to time thereafter, make further returns and pay further taxes in pursuance of said Section 38 of said Act, and your orator is informed and believes that if this Court shall not grant to your orator the relief hereinafter prayed, the defendant will make such a return on or before the 1st day of March, 1910, and will on or before the 30th day of June, 1910, pay such tax as may be imposed for the year commencing January 1st, 1909, and ending December 31st, 1909, in accordance with said Act, and will, in ensuing years, make such returns and pay such taxes as the provisions of said Act purport to require.

Ninth. Your orator further shows that the aforesaid provisions relating to a tax with respect to the carrying on or doing business by corporations, joint stock companies or associations and insurance companies, in said Act contained, are repugnant to the Constitution of the United States and that any tax which may be imposed thereunder upon the defendant, Park Realty Company, and ulti-

12 mately upon your orator as a shareholder therein, is and will be unconstitutional and void, for the reasons and in the respects hereinafter stated, to wit:

(*a*) That such provisions are repugnant to and in conflict with

the Third Clause of the Second Section of Article I of the Constitution of the United States, in that while such tax purports to be and is designated as "a special excise tax with respect to the carrying on or doing business by such corporation," it is in truth and in fact a tax upon the real and personal property owned by and invested in such corporation and upon the net income of such property, and is a direct tax within the meaning of the aforesaid clause and is not as provided in said clause apportioned among the several States in the manner prescribed in the said clause and in Article XIV of the Amendments to the Constitution, and such provisions are therefore unconstitutional and void.

(b) That the provisions aforesaid are repugnant to and in conflict with the Fourth Clause of the Ninth Section of Article I of the Constitution of the United States, in that the tax thereby imposed, although said tax purports to be "an excise tax with respect to the carrying on or doing business by such corporation," is in truth and in fact a tax upon the real and personal property owned by and invested in such corporation and upon the net income thereof, and is a direct tax within the meaning of such clause and is not laid in proportion to the census or enumeration directed to be taken in the Constitution as in such clause made and provided, and such provisions are therefore unconstitutional and void.

(c) That if the tax imposed by the provisions aforesaid shall be determined to be an indirect tax, or a duty, impost or excise,
13 the said provisions are nevertheless unconstitutional and void and they are repugnant to and in conflict with the First Clause of the Eighth Section of Article I of the Constitution of the United States, in that such tax is laid only upon corporations, joint stock companies or associations organized for profit and having a capital stock represented by shares and upon insurance companies, and is not laid upon natural persons, co-partnerships, or other associations of natural persons not incorporated and not having a capital stock represented by shares, and that said tax does not effect or create an equality of burden among direct competitors and is, therefore, not uniform throughout the United States. Your orator alleges that there are many and divers natural persons, co-partnerships and other associations of natural persons not incorporated and not having a capital stock represented by shares, throughout the United States and in the neighborhood of and in direct competition with the defendant Park Realty Company, whose net income is greater than five thousand dollars per year, and greater than the income of the defendant, Park Realty Company, and of many other companies taxed, among whom, upon information and belief, are Julia A. Shaw, owning the Grand Union Hotel, situated at Park Avenue, Forty-first to Forty-second Streets; Jacob Rothschild, owning the Majestic Hotel, situated at Central Park West, Seventy-first to Seventy-second Streets; Thomas R. McNell, Emily P. Kolff, Emma L. Smith and Catherine A. Kingsland, Cornelius F. Kingsland and Daniel K. De Beixedon, as trustees, owning Smith & McNell's Hotel, Washington, Vesey and Greenwich Streets; William Rau, owning the Gallatin Hotel, situated at Sixth Avenue and Forty-sixth Street;

the heirs of Cornelia M. Stewart, deceased, owning the Park Ave
Hotel, situated at Park Avenue, Thirty-second to Thirty-t
14 Streets; the heirs of Hugh Smith, deceased, owning the
ray Hill Hotel, situated at Park Avenue, Fortieth to Fo
first Streets; James R. Roosevelt, Henry B. Ely and Douglas
inson, as trustees under the Will of William Astor for the be
of John J. Astor and certain remaindermen, owning the H
Knickerbocker, situated at Broadway, Forty-first to Forty-sec
Streets; United States Trust Company of New York, as trustee u
the Will of Joseph Fisher, deceased, owning the Hotel Norman
Broadway and Thirty-eighth Street; Cornelia M. Palmer, Juliet
Coleman, Catherine L. Steward, Ellen Cushing, Mary F. De Fo
Florence L. Mabee and Douglas W. Mabee, owning the Hotel
bany, situated at Broadway and Forty-first Street, all in said Boro
of Manhattan, City of New York and Southern District of
York. That by the provisions of said Act aforesaid, no tax is
upon any of the above named nor upon any of the competitor
the defendant, Park Realty Company, being natural persons,
partnerships or other associations of natural persons not incorpor
and not having a capital stock represented by shares.

(d) That if the tax imposed by the provisions aforesaid shal
determined to be an indirect tax, or a duty, impost or excise, ne
theless said tax is unconstitutional and void, and repugnant to
in conflict with the First Clause of the Eighth Section of Artic
of the Constitution of the United States, in that such tax is not
posed upon all corporations engaged in business in the United St
but only upon the defendant, Park Realty Company, and such
porations as have a net income over and above five thousand do
per year, and is therefore not uniform throughout the Un
States.

15 *(e)* That if the tax imposed by the aforesaid provis
shall be determined to be an indirect tax, or a duty, im
or excise, that nevertheless the said tax is and will be uncons
tional and void, and said provisions are in conflict with the
Clause of the Eighth Section of Article I of the Constitution of
United States, in that such tax will ultimately fall upon the sh
holders of the corporation and be deducted from the value of s
shares and from the income of said corporation applicable to
dividends thereon, and your orator and shareholders similarly
ated will be compelled to pay the same, whereas shareholders in
porations having a net income of less than five thousand dollars
not be obliged ultimately to pay such tax, although the total amo
invested by them in shares of such corporations and the net inc
derived by them therefrom may be far in excess of the net inc
received by your orator from its shares in the defendant corporat
and the said tax is therefore not uniform throughout the Un
States.

(f) That if such tax shall be determined to be an indirect tax
a duty, impost or excise, that nevertheless such tax is and wil
unconstitutional and void, and the aforesaid provisions are re
nant to and in conflict with the First Clause of the Eighth Sec

of Article I of the Constitution of the United States, in that there is specifically exempted from the imposition of such tax, labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders and associations operating under the lodge system, and providing for the payment of sick, accident and other benefits to the members of such societies, orders or associations and dependents of such members, domestic building and loan associations organized and operated exclusively for the mutual benefit of
16 their members, and corporations and associations organized and operated exclusively for religious, charitable and educational purposes, no part of the net income of which last inures to the benefit of any private stockholder or individual, although the net income of such corporations and organizations thus exempted may well, and often does, exceed the sum of five thousand dollars, and exceed the income of the defendant, Park Realty Company, and other companies taxed, and the said tax is therefore not uniform throughout the United States.

(*g*) That if the tax imposed by the aforesaid provisions shall be determined to be an indirect tax, or a duty, impost or excise, nevertheless said tax is and will be unconstitutional and void, and said provisions are in conflict with the first clause of the eighth section of Article One of the Constitution of the United States, in that it is the accepted public policy of certain of the States constituting the federal union, such as the State of New York, in which your orator is located, to make easy the divisibility and transferability of real estate, and for that purpose to permit and encourage the organization of corporations to hold and do business in real estate; and it is the policy of certain other States in the federal union, such as the State of Massachusetts, as it is also the policy of Congress with regard to the District of Columbia, not to permit the organization of corporations to buy and sell real estate, and the aforesaid tax will fall upon the defendant Park Realty Company, your orator and your orator's shareholders and those holding real estate within the State of New York and like States through corporate organization, and will not have to be paid by persons holding real estate within other States after the manner and policy of such State governments, and a geographical discrimination is thereby effected, and such tax is not uniform throughout the United States.

17 (*h*) That if the tax imposed by the aforesaid provisions shall be determined to be an indirect tax, or a duty, impost or excise, that, nevertheless, the said tax is and will be unconstitutional and void, and said provisions are in conflict with the First Clause of the Eighth Section of Article I of the Constitution of the United States, in that in providing how said net income may be arrived at from the said gross income of such corporation received from all sources, it is prescribed that there is to be deducted interest actually paid within the year on the bonded or other indebtedness of such corporation to an amount of such bonded and other indebtedness not exceeding the paid up capital stock of such corporation and thereby all interest paid on their bonded or other indebtedness by the defendant and corporations having an indebtedness greater than their paid-

up capital stock is not allowed as a deduction to such corporations as in the case of corporations not having an indebtedness greater than their paid-up capital stock, but only interest on such amount of their bonded or other indebtedness as does not exceed the capital stock of such corporations and as a result the defendant Park Realty Company and corporations being indebted, over and above the amount of their paid-up capital stock are required to pay such tax at a higher rate than such other corporations and said tax is therefore not uniform throughout the United States.

(*i*) That if the tax imposed by the aforesaid provisions shall be determined to be an indirect tax or a duty, impost or excise, that nevertheless, the said tax is and will be unconstitutional and void, and said provisions are in conflict with the First Clause of the Eighth Section of Article I of the Constitution of the United States, in that while it is provided that corporations generally are to be allowed as a deduction in computing their net income only the interest
18 paid on such of the corporate indebtedness as does not exceed the amount of the paid-up capital stock of such corporations, yet in computing the net income in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits is so allowed to be deducted and the deposits with such bank, banking association or trust company constitute part of the indebtedness of such company and a discrimination is thereby created in favor of banks, banking associations and trust companies and against the defendant and corporations other than banks, banking associations or trust companies and said tax is therefore not uniform throughout the United States.

(*j*) That the aforesaid provisions are unconstitutional and any tax which may be imposed thereunder upon the defendant Park Realty Company is and will be unconstitutional and void in that in providing how such net income may be arrived at from the gross income received by such corporation from all sources it is in said Act prescribed that there is to be deducted interest actually paid within the year on the bonded or other indebtedness of such corporation to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, and the effect of such provision is that companies coming within the terms and purview of said Act are classified into two divisions, to wit: such corporations as have an indebtedness exceeding their paid-up capital stock, and such corporations as do not have an indebtedness exceeding their paid-up capital stock, and that the former are taxed at a higher rate than the latter, and such classification rests upon no real distinction and is unnatural and such provisions are not a legitimate and constitutional exercise of the taxing power of Congress to secure
19 revenue to the United States, but are colorably merely and are designed and would have the effect unconstitutionally to regulate the internal affairs of such corporations and to compel such corporations to reduce their indebtedness or issue more paid-up capital stock, by penalizing indebtedness above the amount of the paid-up capital stock, and such provisions and any tax which may be imposed thereunder, deprive of their property without due process

of law the defendant and other corporations being indebted above their paid-up capital stock in contravention of Article V of the Amendments to the Constitution of the United States, and are otherwise contrary to the provisions, policy and implied limitations of the Constitution of the United States.

(*k*) That the aforesaid provisions are unconstitutional and void because thereby the franchises of the defendant Park Realty Company and those conferred by the laws of the several States upon other companies coming within the terms and purview of said Act, including the franchise to be a corporation, and to do business in a corporate capacity, are subjected to a discriminating tax not imposed upon natural persons or co-partnerships; whereas, your orator shows that such franchises have not merely the character of private property or of personal privileges conferred upon the corporators for their own advantage, but are instrumentalities created by the laws of the several States, to carry out the public policy of such States, respectively, in regard to matters of which they have exclusive jurisdiction, involving among other things the ownership of property, the promotion of industry, the character of the citizenhood and the development of natural resources in said several States. And your orator shows, by way of illustration, that the laws of the State of
20 New York, in regard to the organization of corporations, are designed to encourage and make possible the accumulation of capital for large enterprises, including works of public utility which might not otherwise be undertaken by private capital; to make the ownership of property, and interests therein, and particularly of real property, more readily divisible and transferable, thereby promoting the extension of such ownerships to a larger body of citizens; to secure more competent and efficient management of property, and to facilitate the supervision of such management on the part of those acting in a representative capacity; to promote the utilization of new inventions and discoveries, the pursuit of new industries and the seeking of new markets, by distributing the risk involved in such enterprises and limiting the liability of those engaged therein; to inculcate the habit of co-operation among the citizens and to accustom them to act in an organized capacity; to perpetuate the good will and trade names of manufacturing establishments and commercial houses; to avoid the halting of business, and the locking up of capital by reason of death; to obtain information by means of periodical reports in regard to conditions affecting commerce and industry, and to enlarge the revenues of the State by means of taxes and fees imposed as a condition of granting such franchises.

Your orator charges that such means and instrumentalities, employed by said States in the exercise of their sovereign powers and functions as aforesaid, are exempt from taxation by the Federal Government, and your orator charges that a law whereby the liability of any person or persons to taxation upon his or their net income, or any part thereof, is made to depend upon the possession of a corporate franchise is in effect a tax upon the franchise itself, and upon the relationship existing between the corporators and the State
21 by virtue of such franchise, and is in derogation of the rights of the several States to control their internal affairs by such

means and in accordance with such policies as to them shall seem appropriate, and is contrary to the provisions of the Constitution of the United States and particularly to the provisions of Article X of the Amendments to said Constitution, whereby the powers not thereby delegated to the United States or prohibited to the States, are reserved to the States respectively or to the people.

(*l*) That the aforesaid provisions are unconstitutional and void, in that thereby the bonds and obligations of the several States and of their municipalities and other political divisions, the interest thereon and income therefrom are taxed, and in computing the net income over and above Five thousand dollars received by any company liable to pay the said tax no provision is made for a deduction from the gross amount of the income of said company of the interest and income from such State and municipal bonds and other obligations, as may be held by such companies and are the instrumentalities of the respective State Governments, and the power of the several State Governments to borrow money is thereby taxed by the Federal Government contrary to the provisions and policy of the Constitution of the United States, and the implied limitation upon the taxing power of the Federal Government contained therein, and particularly to the provisions of Article X of the Amendments to the Constitution of the United States, whereby the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States, respectively, or to the people.

(*m*) That the aforesaid provisions are unconstitutional,
22 and any tax that is or may be imposed thereunder upon the defendant Park Realty Company is and will be unconstitutional and void, in that said tax purports to be and is designated as "a special tax with respect to the carrying on or doing business by such corporation", and is a tax upon the right, franchise and privilege to be a corporation and to carry on business in a corporate capacity, and the right to authorize the defendant corporation, or any corporation, to carry on or do business within their respective territories, is exclusively vested in the several States, and the right to tax the defendant corporation, or any corporation upon such right or privilege and with respect to carrying on or doing business within their respective territories, is exclusively vested in the several States, and is not conferred by the Constitution upon the United States, and the said provisions are therefore contrary to the provisions, policy and implied limitations of the Constitution of the United States, and particularly repugnant to and in conflict with Article X of the Amendments to the Constitution of the United States, whereby the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

(*n*) That the aforesaid provisions are unconstitutional and any tax which may be imposed thereunder upon the defendant Park Realty Company will be unconstitutional and void, in that said tax is thereby imposed on all corporations engaged in business in any State or territory of the United States or in Alaska, or in the District of Columbia, and is not limited to such corporations as are engaged

in commerce with foreign nations or among the several States, or with the Indian tribes, and if any right is vested in the Congress to tax corporations with respect to the carrying on or doing business by said corporations, said right rests upon and exists by virtue of the third clause of the eighth section of Article I of the Constitution of the United States, whereby Congress is given power to regulate commerce with foreign nations and among the several States and with the Indian tribes, and Congress is without power to impose a tax upon the defendant Park Realty Company with respect to the carrying on or doing business by such corporation with and not outside of the State of New York.

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(*o*) That the aforesaid provisions are unconstitutional, and any tax which may be imposed thereunder is and will be unconstitutional and void, in that it is provided by the Act of Congress aforesaid that the defendant corporation, and other corporations, joint stock companies or associations and insurance companies coming within the terms and purview of the said Act, shall, on or before the 1st day of March, 1910, and on or before the 1st day of March in each year thereafter, make a true and accurate return, under oath or affirmation of the president, vice-president or other principal officer, and treasurer or assistant treasurer, to the Collector of Internal Revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth the gross income of such corporation, joint stock company or association, or insurance company, the total amount of the ordinary and necessary expenses actually paid out of earnings, the total amount of losses sustained, the amount of interest paid on its bonded or other indebtedness to an amount not exceeding its paid up capital stock, and other facts relating to its financial standing and the conduct of its business, to the end of arriving at the net income of such business; and it is further provided that in case such corporation, joint stock company or association, or insurance company, does not render such return, then the failure to make such return is to be attended with diverspenalties, and if such return is not made or the Commissioner of Internal Revenue has in his own judgment ground to believe said return is incorrect, then the Commissioner of Internal Revenue is authorized by any regularly appointed revenue agent to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or insurance company to be examined concerning the property and business and financial standing of such corporation, joint stock company or association, or insurance company, and to require the production of books and papers upon such examination; and jurisdiction is given to the Circuit and District Courts of the United States to compel such attendance of wit-

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nesses before the Commissioner of Internal Revenue, and the production of such books and papers and the aforesaid returns with such corrections as the Commissioner of Internal Revenue may make thereto, are upon the assessment of the tax to be filed in said Commissioner's office and thereupon become public records open to the inspection of all, and that all the foregoing is and will be
25 greatly injurious to the defendant corporation and to other corporations, joint stock companies or associations, and insurance companies, coming within the terms and purview of this Act, and will disclose the property, business and affairs of the same to their competitors in business, to the great detriment of said companies, and constitutes an unreasonable search of their persons, houses, papers and effects within the meaning of and contrary to Article IV of the Amendments to the Constitution of the United States.

(*p*) That the aforesaid provisions are repugnant to and in conflict with Article V of the Amendments to the Constitution of the United States, in that the effect thereof is to deprive of their property, without due process of law, the defendant corporation, and other corporations coming within the terms and purview of this Act.

(*q*) That the aforesaid provisions constitute one entire and interdependent system of taxation, and inasmuch as said provisions are unconstitutional and void, for the reasons and in respect to the matters hereinbefore stated, the said provisions are in all respects unconstitutional and void, and any tax which may be levied thereunder upon the defendant Park Realty Company is and will be unconstitutional and void, not only to the extent that it is unconstitutional as to the matters hereinbefore set forth, but in each and every respect and as to the whole thereof.

Tenth. Your orator further shows that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and your orator has protested to the defendant and to the directors of said defendant who are not officers of your orator and who constitute a majority of
26 the Board of directors of said corporation, against the compliance by said corporation, and by said Board of Directors, with the provisions of said Act of Congress hereinbefore referred to, and has claimed before said Board of Directors that the said provisions, so far as any tax is imposed thereby upon the defendant Park Realty Company, are unconstitutional, and has requested and demanded of the defendant and its said directors that they do not comply with said provisions, nor voluntarily make any return or statement in obedience thereto nor voluntarily pay any tax provided for therein, and has requested that said company and its directors contest the constitutionality of the said Act and prevent such unconstitutional and improper diversion of the assets of the corporation in the payment of such tax, and apply to a Court of competent jurisdiction to determine the liability of the company under said Act, and take such steps as might be necessary to protect the rights of the company's shareholders, and has submitted such claim and demand to the said defendants in writing in the form of a letter addressed to said defendants, a copy of which is hereto annexed and

marked Exhibit A, and made a part hereof, and your orator begs leave to refer to the same to the same extent and with the same force and effect as if said letter were here set forth in full.

That, nevertheless, said defendant and its said directors have in all respects refused, and do still refuse, to comply with your orator's demands, as aforesaid, and at a regular meeting of the Board of Directors of said corporation, at which the matter of such demand was duly laid before them, said Board of Directors duly passed a resolution refusing in all respects to comply with your orator's de-
mands, for the reason that want of compliance with the pro-
27 visions of said statute would subject the company to litigation with the United States, or with officers of the Government thereof, and to the risk of incurring penalties for not making returns or paying the tax sought to be imposed by the said statute, and of clouding the title to the real estate of the company, which said resolution was communicated to your orator in a letter bearing date December 16, 1909, which is made a part hereof, and a copy of which is annexed hereto and marked Exhibit B, and your orator prays leave to refer to said letter to the same extent and with the same force and effect as if said letter were here set forth in full.

Your orator further shows that it has been, and is unable to have the said action by the Board of Directors reviewed and rescinded or modified by the general body of stockholders of said corporation, and to have said stockholders direct the said Board of Directors to comply with your orator's demand, inasmuch as by the certificate of incorporation and by-laws of the company and by the general laws of the State of New York relating to corporations, pursuant to which said company was incorporated, no provision is made for such control by the general body of stockholders over the acts of the Board of Directors, and no power is conferred to remove said Directors during their tenancy of office, and for the further reason that the annual meeting of said corporation will not take place until the second day of March, 1910, and by the Act of Congress hereinbefore referred to, a return pursuant to such Act is required by said Act to be made on or before the first day of March, 1910.

Eleventh. Your orator further shows that the making of the aforesaid returns and payment of the aforesaid taxes will result in a
great diversion and misappropriation of the assets of the
28 defendant corporation, and will unconstitutionally lessen and diminish the equity of the shareholders in said corporation and the interest of your orator in said corporation as a shareholder therein will be greatly and irreparably injured thereby.

Twelfth. Your orator further shows that unless this Court shall grant to your orator the relief hereinafter prayed, the defendant will pay the aforesaid tax for the past and each year in the future, and threupon will be subject in each successive year to numerous suits at law and in equity by the stockholders of said Company, for the loss and damage sustained by them through the payment of such taxes as aforesaid, and said Company will be obliged to submit wholly to such unconstitutional taxes or in each year to bring suit against the officers of the Government of the United States to recover back the taxes paid as aforesaid. That the issues to be determined in

all such suits brought as aforesaid would be substantially identical with those to be passed upon herein and can be determined more speedily and conveniently by the Court in this suit, and the granting of the relief hereinafter prayed will prevent such multiplicity of suits as aforesaid.

Thirteenth. Your orator further shows that the subject matter of the tax aforesaid is the right of franchise of the defendant, derived from the Laws of the State of New York, to be a corporation, and to do business in a corporate or organized capacity; that said right is of substantial pecuniary value, and that the defendant, in pursuance of one of the conditions upon which said right or franchise was granted, pays an annual tax thereon to the State of New York, which is equivalent to the tax paid upon real estate in the City of
29 New York of the value of Twenty-seven thousand five hundred dollars or more, and your orator charges that said right or franchise being conferred upon the defendant for the purpose, among others, of carrying out the public policy of the State of New York, as hereinabove set forth, is exempt from taxation by the United States, and that said right of exemption from taxation by the United States is of the value of more than Two thousand dollars; that the value of all the preferred stock of said Park Realty Company will be diminished to the amount of at least $5,000 if this defendant be permitted to pay to the United States in each year the aforesaid tax; that your orator is the owner of about fifty per cent. of said preferred stock, and will suffer damage through the diminution in value of said stock in the sum of at least $2,500, if the defendants be not perpetually restrained from paying the tax aforesaid; that the matter in dispute herein, exclusive of interest and costs, exceeds the sum or value of Two thousand dollars ($2,000.)

Inasmuch, therefore, as your orator has no adequate remedy at law for its aforesaid grievance and can have relief only in equity, your orator files this bill of complaint in behalf of himself and of other shareholders who may come in and join in the prosecution and contribute to the expense of this suit, and prays for equitable relief as follows:

(1) That the provisions relating to making returns of net income and payment of taxes imposed upon the carrying on or doing business by corporations, joint stock companies or associations, and insurance companies, contained in the Act of Congress afore-
30 said, so far as any tax is sought to be imposed thereby upon the defendant, Park Realty Company, may be adjudged unconstitutional and void.

(2) That the defendant may be perpetually restrained from voluntarily making or causing to be made any return or statement pursuant to said provisions, and from voluntarily paying or causing to be paid any tax which may be imposed thereunder.

(3) That pending such final decree as this Honorable Court may see fit to make herein, a temporary injunction may issue restraining the said defendant from voluntarily making or causing to be made any statement or return pursuant to the aforesaid provisions, and

from voluntarily paying or causing to be paid any tax which may be imposed thereunder.

(4) That the above named defendant be required to answer all and singular the matters above stated.

(5) That a writ of subpœna may be granted to your orator to be directed to the defendant Park Realty Company, thereby requiring said defendant personally to appear on a certain day before the Court, then and there full, true, direct and perfect answer to make (but not under oath which is hereby expressly waived) to all and singular the premises and further to perform and abide by such further order, direction or decree thereof as to the Court shall seem meet.

31 (6) That your orator may have such further and other relief as the Court may deem proper and equitable, and your orator will ever pray, etc.

DAVIES, STONE & AUERBACH,
Solicitors for Complainant.

JULIEN T. DAVIES,
RICHARD G. BABBAGE,
Of Counsel.

CEDAR STREET COMPANY,
[L. S] By BYRON M. FELLOWS, *Treasurer.*

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

Byron M. Fellows, being duly sworn, deposes and says that he is Treasurer of Cedar Street Company, the above named complainant; that he has read the foregoing bill of complaint, and the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason this verification is made by deponent and not by the complainant, is that the complainant is a corporation of which deponent is the Treasurer.

The seal affixed to said bill of complaint is the corporate seal of said complainant, and was so affixed by order of the Board of Directors.

32 The sources of deponent's information and grounds of his belief, are correspondence with the defendant, and information derived in the discharge of his duties as an officer of the complainant.

BYRON M. FELLOWS.

Sworn to before me this 26th day of January, 1910.

[L. S.] HAROLD HARPER,
Notary Public, County of New York.

EXHIBIT A.

Cedar Street Company,
111 Broadway, New York.

DECEMBER 7TH, 1909.

To Park Realty Company and to Samuel E. Jacobs, Maximilian Morgenthau and Henry S. Herrman, three of the directors thereof.

SIRS: We are stockholders of record in the Park Realty Company and are informed that the Company intends to voluntarily comply with the requirements of the provisions relating to the tax with respect to the carrying on or doing business by such Company and upon its net income, contained in the Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," and particularly in Section 38 thereof, which act became a law August 5th, 1909, and is known as the tariff act. We are further informed that the Company intends to make returns pursuant to and in compliance with such act and to pay such tax as may be assessed upon it in accordance therewith.

We desire to notify you that we claim that the provisions of said Act of Congress in respect to such tax on the carrying on or doing business, and upon the net income of said Company are unconstitutional. As a shareholder in said company, we hereby protest against any action of the Company and its Directors in voluntarily complying with said provisions, and we request that said Company and its Directors shall refrain from voluntarily complying with any of said provisions, and from voluntarily making any returns or statements in obedience thereto, and from voluntarily paying the tax provided for therein. We further claim that the payment of any such tax would be a waste and misappropriation of the assets of the Company. We further request that said Company and its Directors shall contest the constitutionality of said Act and prevent an unconstitutional and improper diversion of the assets of the corporation in the payment of any such tax, and shall apply to a court of competent jurisdiction to determine the liability of the Company under said Act and take such steps as may be necessary to protect the rights of the Company's shareholders.

Very truly yours,

CEDAR STREET COMPANY,
By R. G. BABBAGE, *President.*

34 EXHIBIT B.

Samuel E. Jacobs.
135 Broadway, New York.

DECEMBER 16, 1909.

Cedar Street Company, 111 Broadway, New York City.

GENTLEMEN: In reply to your letter of December 7th, 1909 we beg to state that the same was duly submitted to our Directors at a meeting held December 14th, 1909. The Minutes of that meeting, so far as they relate to your letter, are as follows:

"Minutes of Special Meeting of the Board of Directors of the Park Realty Company, held on December 14th, 1909, at the office of the company, No. 135 Broadway. Present: Messrs. Herrman, Jacobs, Babbage, Morgenthau and Fellows, being the entire Board of Directors. The Minutes of the last meeting were read and on motion approved.

Mr. Babbage presented a letter from the Cedar Street Company in relation to the corporation tax, which letter was read and directed to be spread upon the minutes. The subject matter of the letter was then taken up and discussed. Mr. Herrman then offered the following resolution, which was seconded by Mr. Jacobs.

Whereas Cedar Street Company, a stockholder of record of this company, has made certain claims and demands upon this company and its Directors, in connection with making returns or payment of taxes under Section 38 of the Tariff Bill of 1909, in a communication in writing, dated December 7th, 1909,

35 Resolved that the Board of Directors decline to comply with the requests of Cedar Street Company for the reason that want of compliance with the provisions of the said statute would subject this company to litigation with the United States, or with officers of the Government thereof, and to the risk of incurring penalties for not making returns or paying the taxes sought to be imposed by the said statute, and of clouding the title to the real estate of the company.

A vote was then taken: Messrs. Jacobs, Herrman and Morgenthau voted in favor of the resolution and Messrs. Babbage and Fellows against it, whereupon the President declared the same duly carried."

Very truly yours,

PARK REALTY COMPANY,
SAMUEL E. JACOBS,
Treasurer.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

36 *Appearance.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Defendant.

To the Clerk of said Court:

Please enter my appearance as solicitor for the defendant in the above entitled case.

Dated New York, January 26th, 1910.

JAMES FRANK,
Solicitor for Defendant, 135 Broadway, Borough of Manhattan, City of New York.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

37 *Demurrer.*

In the Circuit Court of the United States for the Southern District of New York.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Defendant.

The Demurrer of the Park Realty Company, Defendant, to the Bill of Complaint of Cedar Street Company, Complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto and for cause of *demurrage* showeth, that the said complainant has not in and by said bill, made or stated such a cause as doth, or ought to entitle it to any such relief as is thereby sought and prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court, whether it shall be compelled to make any further or other answer to the said bill or any of the matters or things therein contained and prays to be hence dismissed with its reasonable costs in this behalf sustained.

Dated January 26th, 1910.

JAMES FRANK,
Solicitor for Defendant, 135 Broadway, Borough of Manhattan, N. Y. C.

38 STATE OF NEW YORK,
County of New York, ss:

Maximilian Morgenthau makes solemn oath and says that he is the President of Park Realty Company and that the foregoing demurrer is not interposed for delay.

MAXIMILIAN MORGENTHAU.

Sworn to and subscribed before me this 26th day of January, 1910.

MARIE D. GLASSMACHER,
Notary Public, New York County.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JAMES FRANK,
Solicitor for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

39 *Decree.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Defendant.

This cause came on to be heard at the January Term of this Court, 1910, and was argued by counsel, and thereupon, upon the consideration thereof, it was

Ordered, adjudged and decreed that the demurrer to the bill of complaint be and the same hereby is sustained upon the ground that the said complain't has not in and by the said bill made or stated any such cause as does or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against said defendant, and that the said bill of complaint be and the same hereby is dismissed, with costs to be taxed by the Clerk.

Dated this 26th day of January, 1910.

LEARNED HAND.
Judge of the Circuit Court of the United States for the Southern District of New York.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

40 *Notice of Appeal.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Respondent.

To the Judges of the Circuit Court of the United States for the Southern District of New York:

The above named complainant, considering *himself* aggrieved by the decree made and entered by the above mentioned Court in the above entitled cause, on the 26th day of January, 1910, wherein and whereby it was ordered, adjudged and decreed that the demurrer to the bill of complaint herein be sustained and this cause be dismissed, does hereby appeal to the United States Supreme Court from said decree; and complainant prays that this *his* appeal may be allowed, and that a transcript of the record and the proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, January 25th, 1910.

DAVIES, STONE & AUERBACH,
Solicitors for Complainant.

(Endorsed:) Due service of the within notice of appeal is hereby admitted. Dated New York, *July* 27, 1910. James Frank, Solicitor for Defendant. U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

41 *Order Allowing Appeal.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Respondent.

On motion of Messrs. Davies, Stone & Auerbach, solicitors for complainant, it is

Ordered that the appeal to the Supreme Court of the United States from the final decree filed and entered herein on the 26th day of January, 1910, be and the same hereby is allowed; and that a certified transcript of the record and all proceedings herein be forth-

with transmitted to the said United States Supreme Court at Washington, D. C.; and it is further

Ordered that the bond on appeal be fixed at the sum of $250 the same to act as a supersedeas bond and also as a bond in costs and damages on appeal; and that service of all proceedings be had upon the United States Attorney for the Southern District of New York, as well as upon respondent.

Dated, January 26th, 1910.

LEARNED HAND,
Judge of Circuit Court of the United States for the Southern District of New York.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

42 *Assignment of Errors.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

CEDAR STREET COMPANY, Complainant,
against
PARK REALTY COMPANY, Respondent.

Comes now the complainant and files the following assignment of errors, upon which it will rely upon its appeal from the decree made by this Honorable Court on the 26th day of January, 1910, in the above-entitled cause:

First. That the Court erred in sustaining the demurrer interposed by the defendant to the bill of complaint herein, and holding that the said bill was without equity.

Second. That the Court erred in not decreeing that Section 38 of the Act of Congress, known as Chapter Six of the Acts of the First Session of the Sixty-First Congress, in so far as the same purported to require the defendant to make certain returns and to impose taxes upon said defendant, was unconstitutional and void, and that said section was violative of the third clause of the second section of Article I, the fourth clause of the ninth section of Article I, and the first clause of the eighth section of Article I, of the Constitution of the United States, and of Article IV, V, and X of the Amendments to the Constitution of the United States.

Third. That the Court erred in not decreeing that the complainant was entitled to the relief prayed for.

43 Fourth. That the Court erred in dismissing said bill with costs.

Wherefore, the appellant, complainant in the Court below, prays that the decree of said Court may be reversed, and in order that the foregoing assignment of errors may be a part of the record, the complainant presents the same to the Court and prays that such disposi-

tion may be made thereof, as in accordance with law and the statutes of the United States in such case made and provided.

All of which is respectfully submitted.

DAVIS, STONE & AUERBACH,
Solicitors for Complainant.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 26, 1910. John A. Shields, Clerk.

44

Bond.

Know all men by these presents, that we, Cedar Street Company, as principal, and the National Surety Company, a New York corporation, of No. 115 Broadway, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto Park Realty Company in the full and just sum of Two hundred and fifty ($250.00) dollars, to be paid to the said Park Realty Company, its certain attorney, successors, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of January, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of The United States for the Southern District of New York in a suit depending in said Court, between Cedar Street Company and Park Realty Company a decree was rendered against the said Cedar Street Company and the said Cedar Street Company having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Park Realty Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Cedar Street Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CEDAR STREET COMPANY,
By R. G. BABBAGE, *President.*

Attest: [SEAL.]

BEN FELLOWS, *Treasurer.*
NATIONAL SURETY COMPANY,

[L. S.] By WM. A. THOMPSON, [SEAL.]
Resident Vice-President. [SEAL.]

Attest:

——— ———, *Res. Assistant Secretary.*

Sealed and delivered in presence of—
HAROLD HARPER.

UNITED STATES OF AMERICA,
City and County of New York,
Southern District of New York, ss:

On this 27th day of January, in the year 1910, before me personally came Richard G. Babbage, to me known, who being by me duly sworn, did depose and say that he resided in the Borough of Manhattan, City, County and State of New York, that he is the President of the Cedar Street Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation, that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said Company and that he signed his name thereto by like order.

[L. S.]

HAROLD HARPER,
Notary Public, N. Y. County.

45 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of January one thousand nine hundred and ten before me personally came Wm. A. Thompson, known to me to be the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Cedar Street Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Res. Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, that the seal affixed to the within Bond of Cedar Street Company is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Res. Vice-President of said Company, and that he is acquainted with M. W. Gewecke and knows him to be the Res. Asst. Secretary of said Company; and that the signature of said M. W. Gewecke subscribed to said Bond is in the genuine handwriting of said M. W. Gewecke, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million dollars. That —— —— is our agent to acknowledge service in the Judicial District wherein this bond is given.

[SEAL.]

WM. A. THOMPSON.
(Deponent's signature.)

COPY

Sworn to, acknowledged before me, and subscribed in my presence this 27th day of January, 1910.

[SEAL.]

ETTA B. GEWECKE,
Notary Public for County of Kings.
(Officer's signature, description and seal.)

Certificate filed in New York, Queens, Richmond, Westchester & Nassau Counties.

46 (Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. L. H., U. S. District Judge. U. S. Circuit Court, Southern District N. Y. Filed Jan. 27, 1910. John A. Shields, Clerk.

47 By the Honorable Learned Hand, One of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To Park Realty Company and James Frank, its Solicitor:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the 17th day of February, 1910, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Cedar Street Company is complainant and appellant and you are defendant and appellee, to show cause, if any there be, why the decree rendered against said complainant and appellant in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 26th day of January, in the year of our Lord One Thousand Nine Hundred Ten, and of the Independence of the United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

LEARNED HAND,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

48 [Endorsed:] R. H. U. Circuit Court of the United States for the Southern District of New York, Second Circuit. Cedar Street Company against The Park Realty Company. (Original.) Citation on Appeal. Davies, Stone & Auerbach, Solicitors for Complainant, Mutual Life Building, 34 Nassau Street, New York City. U. S. Circuit Court, Southern District N. Y. Filed Jan. 27, 1910. John A. Shields, Clerk.

Due and timely service of the within citation on appeal is hereby admitted.

Dated New York, Jan. 27, '10.

JAMES FRANK,
Solicitor for Def't.

49 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to forty-eight inclu-ive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled

CEDAR STREET COMPANY, Compl't-Appellant,
against
THE PARK REALTY COMPANY, Defendant-Appellee,

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of January, in the year of our Lord One Thousand Nine Hundred and ten, and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Cedar Street Company, Compl't-Appellant, vs. The Park Realty Company, Def't-Appellee. Transcript of Record from the Circuit Court of the United State for the Southern District of New York.

Endorsed on cover: File No. 21,983. S. New York C. C. U. S. Term No. 757. Cedar Street Company, appellant, vs. Park Realty Company. Filed January 28th, 1910. File No. 21,983.

R COPY

FILED.
JAN 31 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. ~~757~~ 445

CEDAR STREET COMPANY, APPELLANT,

vs.

PARK REALTY COMPANY, MAXIMILIAN MORGENTHAU, HENRY S. HERRMAN, SAMUEL E. JACOBS, BYRON M. FELLOWS, AND RICHARD G. BABBAGE, APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

FREDERIC D. McKENNEY,
Solicitor for Appellant.

JULIEN T. DAVIES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 757.

CEDAR STREET COMPANY, APPELLANT,

vs.

PARK REALTY COMPANY, MAXIMILIAN MORGENTHAU, HENRY S. HERRMAN, SAMUEL E. JACOBS, BYRON M. FELLOWS, AND RICHARD G. BABBAGE, APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Now comes Cedar Street Company, appellant above-named, by Frederic D. McKenney, its solicitor of record, and showing to this Honorable Court that the suit above-entitled involves issues of great and general public importance, in that said suit arises under and out of the provisions of section 38 of the act of Congress approved August 5, 1909, 36 Stats. L., 11, commonly called the "Federal Corporation Tax Law," and presents in specific and concrete form the question as to the validity of such law under the provisions of the Constitution of the United States of America, moves the court to advance the same for oral argument at an early day.

FREDERIC D. McKENNEY,
Solicitor for Appellant.

JULIEN E. DAVIES,
Of Counsel.

STATEMENT.

The appellee, Park Realty Company, does not oppose this motion to advance.

Park Realty Company is a corporation under the laws of New York, having its principal place of business in New York city, and having a duly authorized capital stock of $500,000, represented by shares.

It is the owner of certain real estate and premises situated in New York city, known as the "Hotel Leonori," which it has heretofore leased for a term of years to one Charles Leonori for the specified annual rental of $55,000. Said premises are subject to a certain mortgage of $500,000 and are worth in value over and above said mortgage and all lien and incumbrances thereon the sum of $225,000.

Said Park Realty Company is solely engaged in the business of owning, managing and leasing the real estate and premises aforesaid, and is engaged in no other business whatsoever, either within or without the limits of the State of New York, and it neither has nor received any other or further income from any source than from the rental of its said real property as above described.

Your appellant, Cedar Street Company, is also a corporation under the laws of New York, having its principal place of business in New York city, and as duly authorized under its certificate and articles of incorporation it is a stockholder of record in the Park Realty Company, holding 1,000 shares of the preferred capital stock and 750 shares of the common capital stock of said company, each and every of said shares being of the par value of $100 per share.

Park Realty Company and the majority directors and managers thereof, conceiving that said company falls within the descriptive terms and purview of said section 38 of the act of August 5, 1909, aforesaid, have announced their intention to make at the expense of said company a return in the form required by said section of said act and to pay

upon the basis of such return the amount of the tax specified in and by said section, and have declined and refused to accede to the request of your appellant, Cedar Street Company, not to do so, giving as reason for such refusal that not to make such return would subject the company "to litigation with the United States, or with officers of the Government thereof, and to the risk of incurring penalties for not making (such) return * * * and of clouding the title to the real estate of the company."

Asserting the invalidity of said section of the act of August 5, 1909, and also asserting that "the matter in dispute herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars ($2,000), your appellant, Cedar Street Company, brought its bill of complaint in the United States Circuit Court for the Southern District of New York, to enjoin said Park Realty Company and its officers from making such return and paying such taxes, but the demurrer of said defendant, Park Realty Company, appellee here, to said bill of complaint was sustained by the court and the bill of complaint itself was dismissed.

Among other matters of grave importance which arise out of said section 38 and are specified in and by said bill of complaint, it is especially asserted therein that the provisions of said section of the act of Congress in question are in conflict with and repugnant to the provisions of article 1 of the Constitution of the United States, in that it is attempted thereby to impose a direct tax upon the real and personal property of the Park Realty Company and many other realty and hotel companies and corporations similarly situated and upon the net income of such real and personal property without such tax having first been duly apportioned among the several States as required by the Constitution of the United States.

This question, with others of equally grave and general importance, are presented by the transcript of record in this cause, as the statute in question, if valid, requires all corpora-

tions subject to its terms to make verified returns on or before the first day of March, next, as the basis for the ascertainment and collection of the proposed tax, which tax is required to be paid "on or before the thirtieth day of June," next, under heavy penalties for failure so to pay, it is plain that it is to the interest of the United States, as well as of the thousands of corporations throughout the length and breadth of the United States which fall within the purview of the statute, that a final and authoritative determination of the questions raised in and by this suit should be had at an early day.

Wherefore, appellant, Cedar Street Company, respectfully submits that its motion to advance this cause for early hearing should be granted.

FREDERIC D. McKENNEY,
Solicitor for Appellant.

JULIEN E. DAVIES,
Of Counsel.

Office Supreme Court U
FILED
MAR 8 1910
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

No. ~~757~~ 445

CEDAR STREET COMPANY,
Complainant and Appellant,

vs.

PARK REALTY COMPANY,
Defendant and Appellee.

BRIEF FOR APPELLANT

DAVIES, STONE & AUERBACH,
Solicitors for Appellant.

JULIEN T. DAVIES,
FREDERIC D. McKENNEY,
Of Counsel.

ABSTRACT AND INDEX

The question is whether the Corporation Tax Law passed as part of the Tariff Act of 1909, (Sec. 38, Chapter 6, Acts of the First Session of the 61st Congress) **is Constitutional.**

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In the Supreme Court of the United States

On appeal from The Circuit Court of the United States for the Southern District of New York.

CEDAR STREET COMPANY,
Complainant and Appellant,

against

PARK REALTY COMPANY,
Defendant and Appellee.

OCTOBER TERM, 1909.
No. 757.

BRIEF FOR COMPLAINANT AND APPELLANT.

Statement of the Case.

The above entitled appeal is from a decree of the Circuit Court of the United States for the Southern District of New York sustaining a general demurrer to the Bill of Complaint and dismissing the said bill with costs.

This cause is brought directly here upon the ground that the constitutionality of a law of the United States is drawn in question. This law, which appellant maintains is invalid, is contained in Section 38 of an act designated as "An Act to provide revenue, equalize

duties and encourage the industries of the United States and for other purposes" which was approved August 5, 1909 as Chapter 6 of the Acts of the First Session of the Sixty-first Congress (39 Stats. L. 11) and which is generally known as the "Tariff Act".

For the convenience of the Court, a copy of said section 38 is annexed hereto as "Appendix A". The said section will hereafter be referred to as "The Corporation Tax Law".

The suit is by Cedar Street Company, a stockholder of the appellee, to restrain the appellee company from voluntarily making returns pursuant to the Corporation Tax Law, and from voluntarily paying any taxes, purported to be required thereby, upon the ground that the law is unconstitutional and void, and that rendering obedience thereto would effect a diversion and misappropriation of the assets of the defendant company, and would irreparably impair the interests of the complainant as a stockholder thereof and would further result in a multiplicity of suits. (fols. 3-31.)

The only questions discussed in this brief relate to the constitutionality of the various features of the Corporation Tax Law in its application to the parties herein.

The defendant (appellee herein) having demurred, all of the material facts alleged in the bill will be taken as true.

The appellee is a corporation organized under the laws of the State of New York (fol. 4), and is duly authorized in its certificate of incorporation to buy, sell and lease real estate, erect and improve buildings and manage or lease hotels, apartment houses or warehouses and to make and enter into all contracts and exercise all proper and usual powers incidental to its business. It is authorized to issue $500,000 of capital stock, of which $225,000 is preferred and $275,000 is common, and

it has issued and there is now outstanding $206,000 of the preferred stock and $206,000 of common stock. The par value of its shares is $100. (fol. 5.)

The only business operation in which the company has been engaged has been the purchase of a site at the southeast corner of 63rd Street and Madison Avenue, in the Borough of Manhattan, City of New York, and the erection of a building thereon which is operated as a hotel by a lessee under the name "Hotel Leonori". (fol. 6)

This lease, which does not expire until September 30, 1914, is at a specified annual rental of $55,000. The property is subject to a mortgage to the Bowery Savings Bank of the City of New York, to secure the re-payment of $500,000, with interest at 4½%. The Park Realty Company is solely engaged in the business of owning, managing and leasing the real estate and premises aforesaid, and is engaged in no other business whatsoever either within or without the limits of the State of New York, and it neither has received, nor now receives, any income from any source other than the rental of its real property as above described. The net income of the appellee for the year 1909, computed in accordance with the Corporation Tax Law, is at least the sum of $35,000. (fol. 6.)

It is a fact of common knowledge that New York City, in which the hotel property of the appellee is situated, because of the large number of strangers who are there annually entertained, and also because of the large number of residents who have acquired the habit of hotel life, is famed for its many and elegant hostelries, and is the scene of very keen competition in the hotel business.

Many of these valuable properties are owned, and leased or operated by private individuals, co-partnerships and other associations of natural persons not incorporated and not having a capital stock represented

by shares. Among these hotel properties in the hands of private individuals, all of which yield to their owners a larger net income than that of the Park Realty Company may be mentioned: the Grand Union Hotel, the Majestic Hotel, Smith and McNell's Hotel, the Gallatin Hotel, the Park Avenue Hotel, the Murray Hill Hotel, the Hotel Knickerbocker, the Hotel Normandie and the Hotel Albany (fols. 13-14).

The Corporation Tax Law appears to be applicable to the appellee corporation. The full text of the law is set out in "Appendix A," but the important features which will be brought to the attention of the court on the argument are as follows:

(1) Every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State, is made subject to pay annually "a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above $5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon the stocks of other corporations."

(2) From the provisions of said law are specifically exempted labor, agricultural, and horticultural organizations, fraternal beneficiary societies, orders and associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, and any corpora-

tion or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

(3) The net income taxed as aforesaid is to be ascertained by deducting from the gross amount of the income of the corporation (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rental or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies, or associations, or insurance companies, subject to the tax hereby imposed.

From the net income so computed the further sum of $5,000 is to be deducted and the remainder

is the amount upon which the tax is to be computed.

(4) To the end of arriving at the net income sought to be taxed, the corporation is required on or before the first day of March, 1910, and the first day of March in each year thereafter, to made a true and accurate return under oath to the Collector of Internal Revenue for the District in which the corporation has its principal place of business, setting forth, (first) the total amount of the paid-up capital stock of such corporation outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation at the close of the year; (third) the gross amount of the income of such corporation received during such year from all sources, also the amount received by such corporation within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation; (seventh) the amount paid by it within the year for taxes imposed under

the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or associations, or insurance company, after making the deductions in this section authorized.

(5) The returns so made are to be transmitted to the Commissioner of Internal Revenue who is to assess the tax which the corporation is liable to pay thereon on or before the first day of June in each successive year, which is required to be paid on or before the 30th day of June.

(6) Whenever a return is not made or the Commissioner of Internal Revenue from evidence produced before him has, in his opinion, ground to believe that the return is incorrect, he may require further information of the corporation and is authorized by any regularly appointed revenue agent, specifically designated by him for that purpose, to examine any books and papers bearing upon the matters to be included in the return of the corporation, and to require the attendance of any officer or employee and to take his testimony, with power to administer oaths, and he may invoke the aid of any Court of the United States, having jurisdiction, to require the attendance of such officers or employees, and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend the return or make a return where none has been made.

(7) When the assessment is made, the returns, together with any corrections thereof, are to be

filed in the office of the Commissioner of Internal Revenue and constitute public records open to inspection as such.

(8) In the case of any return made with false or fraudulent intent, the Commissioner of Internal Revenue is to add one hundred per centum of the tax, and in case of a refusal or neglect to make a return or to verify the same, he is to add fifty per centum of the tax. If any corporation refuses or neglects to make a return or renders a false or fraudulent return, such corporation is made liable to a penalty of not less than $1,000, and not exceeding $10,000.

By the foregoing provisions, the appellee, Park Realty Company, is required to make a return in accordance with the provisions of the Corporation Tax Law on or before the first day of March, 1910, and on or before the first day of March in each year thereafter, and on or before the thirtieth day of June in each year to pay such tax as the Commissioner of Internal Revenue shall assess upon the basis of such returns (fols. 7-10).

The majority of the directors of the appellee concede both the constitutionality of the law and its application to the Park Realty Company (fol. 11 and fols. 26-27).

The appellant is also a New York Corporation, and by its certificate of incorporation is duly authorized to hold the stocks of other companies, and it is a stockholder of record in the appellee, owning one thousand shares of the preferred stock of the par value of $100 each (fol. 4).

The officers of the appellant being convinced of the unconstitutionality of the Corporation Tax Law, for the reasons urged hereafter in this brief, on December 7th, 1909, addressed a letter to the appellee and the directors

who were not officers of the appellant, and who constitute a majority of the Board of Directors of the appellee, as follows: (fol. 26).

CEDAR STREET COMPANY,
111 Broadway,
New York.

December 7th, 1909.

To Park Realty Company and to Samuel E. Jacobs, Maxmilian Morgenthau and Henry S. Herrman, three directors thereof:

Sirs:

We are stockholders of record in the Park Realty Company and are informed that the Company intends to voluntarily comply with the requirements of the provisions relating to the tax with respect to the carrying on or doing business by such Company and upon its net income, contained in the Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes", and particularly in Section 38 thereof, which act became a law August 5th, 1909, and is known as the tariff act. We are further informed that the Company intends to make returns pursuant to and in compliance with such act and to pay such tax as may be assessed upon it in accordance therewith.

We desire to notify you that we claim that the provisions of said Act of Congress in respect to such tax on the carrying on or doing business, and upon the net income of said Company are unconstitutional. As a shareholder in said Company, we hereby protest against any action of the Company and its Directors in volun-

tarily complying with said provisions, and we request that said Company and its Directors shall refrain from voluntarily complying with any of said provisions, and from voluntarily making any returns or statements in obedience thereto, and from voluntarily paying the tax provided for therein. We further claim that the payment of any such tax would be a waste and misappropriation of the assets of the Company. We further request that said Company and its Directors shall contest the constitutionality of said Act and prevent an unconstitutional and improper diversion of the assets of the corporation in the payment of any such tax, and shall apply to a court of competent jurisdiction to determine the liability of the Company under said Act and take such steps as may be necessary to protect the rights of the Company's shareholders.

Very truly yours,

CEDAR STREET COMPANY,

By R. G. BABBAGE,

President.

(fols. 32-33)

The intentions of the appellee were made clear in a communication in writing addressed to the appellant as follows (fol. 27):

SAMUEL E. JACOBS,
135 Broadway,
New York.

December 16 1909.

Cedar Street Company,
111 Broadway, New York City.

Gentlemen:

In reply to your letter of December 7th, 1909 we beg to state that the same was duly submitted to our Direc-

tors at a meeting held December 14th, 1909. The Minutes of that meeting, so far as they relate to your letter, are as follows:

"Minutes of Special Meeting of the Board of Directors of the Park Realty Company, held on December 14th, 1909, at the office of the Company, No. 135 Broadway. Present: Messrs. Herrman, Jacobs, Babbage, Morgenthau and Fellows, being the entire Board of Directors. The Minutes of the last meeting were read and on motion approved.

Mr. Babbage presented a letter from the Cedar Street Company in relation to the corporation tax, which letter was read and directed to be spread upon the minutes. The subject matter of the letter was then taken up and discussed. Mr. Herrman then offered the following resolution, which was seconded by Mr. Jacobs.

WHEREAS Cedar Street Company, a stockholder of record of this company, has made certain claims and demands upon this company and its Directors in connection with making returns or payment of taxes under Section 38 of the Tariff Bill of 1909, in a communication in writing, dated December 7th, 1909.

RESOLVED that the Board of Directors decline to comply with the requests of Cedar Street Company for the reason that want of compliance with the provisions of the said statute would subject this company to litigation with the United States, or with officers of the Government thereof, and to the risk of incurring penalties for not making returns or paying the taxes sought to be imposed by the said statute, and of clouding the title to the real estate of the company.

A vote was then taken: Messrs. Jacobs, Herrman and Morgenthau voted in favor of the resolution and Messrs.

Babbage and Fellows against it, whereupon the President declared the same duly carried."

Yours very truly,
PARK REALTY COMPANY,
SAMUEL E. JACOBS,
Treasurer.
(fols. 34-35)

The appellant was unable to have this action by the Board of Directors reviewed and rescinded or modified by the general body of stockholders of the Park Realty Company, and to have the stockholders direct the Board of Directors to comply with the Cedar Street Company's demands, inasmuch as, by the certificate of incorporation and by-laws of the appellee Company and by the general laws of the state of New York relating to corporations, pursuant to which the appellee was incorporated, no provision is made for such control of the general body of stockholders over the acts of the Board of Directors, and no power is given to remove said Directors during their tenancy of office, and for the further reason that the annual meeting of said corporation was not to take place until the second day of March 1910, while the Corporation Tax Law purported to require a return to be made on or before the first day of March, 1910 (fol. 27).

In view of the attitude assumed by the appellee and the majority of its Board of Directors, the appellant is powerless to prevent the making of the returns and the payment of the taxes purported to be required by this law which it claims to be unconstitutional, unless relief is granted it by a court of equity.

The court below has sustained a demurrer and dismissed the bill, thereby holding that the said bill was without equity and that the Corporation Tax Law was a valid enactment. (fols. 37-39.)

Specification of Errors.

In order that the question of the constitutionality of the Law may be presented squarely to this Court, the appellant has assigned the following errors with respect to the sustaining of the demurrer and the dismissal of the bill in the Court below.

First. That the Court erred in sustaining the demurrer interposed by the defendant to the bill of complaint herein, and holding that the said bill was without equity (fol. 42).

Second. That the Court erred in not decreeing that Section 38 of the Act of Congress, known as Chapter Six of the Acts of the First Session of the Sixty-first Congress, in so far as the same purported to require the defendant to make certain returns and to impose taxes upon said defendant, was unconstitutional and void, and that said section was violative of the third clause of the second section of Article I, the fourth clause of the ninth section of ArticleI, and the first clause of the eighth section of Article I, of the Constitution of the United States, and of Articles IV, V. and X of the Amendments to the Constitution of the United States (fol. 42).

Third. That the Court erred in not decreeing that the complainant was entitled to the relief prayed for (fol. 42).

Fourth. That the Court erred in dismissing said bill with costs (fol. 43).

POINT I.

The Tax imposed upon the Appellee by the Provisions of the Corporation Tax Law is a Direct Tax upon Income from Real Estate and Personal Property and not being appor-

tioned among the several States is unconsti tutional.

The provisions of the Constitution of the United State which we conceive to be applicable to this discussion are the third clause of the Second Section of Articl I, and the fourth clause of the Ninth Section of Articl I.

The former so far as material is

> "Representatives and direct taxes shall be ap portioned among the several states which may b included within this Union, according to their respec tive numbers;"

The latter is

> "No capitation or other direct tax shall be laid unless in proportion to the census or enumeratio hereinbefore directed to be taken."

The intent and effect of these two provisions is be lieved to be identical. This court has said:

> "The Constitution ordains affirmatively tha representatives and direct taxes shall be apportione among the several states according to numbers, an negatively that no direct tax shall be laid unless i proportion to the enumeration."
>
> *Pollock v. Farmers Loan & Trust Company,* (re *hearing*) 158 U. S. 601 at p. 621.

The purpose of these provisions has been thus ex plained by this court:

> "Nothing can be clearer than that what the Con stitution intended to guard against was the exercis by the general government of the power of directl taxing persons and property within any stat through a majority made up from the other state It is true that the effect of requiring direct taxes t be apportioned among the States in proportion t

their population is necessarily that the amount of taxes on the individual taxpayer in a state having the taxable subject matter to a larger extent in proportion to its populatian than another state has, would be less than in such other state, but this inequality must have been held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers."

Pollock v. F. L. & T. Co., 157 U. S. 429 at p. 582.

A.

The Tax Sought to be Imposed upon the Appellee is not Apportioned.

In the four instances in which an apportioned tax has been imposed, (Acts of July 14, 1798, August 2, 1813, January 19, 1815 and August 5, 1861) the method has been to call for a specified lump sum from the whole country and to assign to each State its quota in proportion to the population of the State. The Corporation Tax Law prescribes a certain rate of taxation for all corporations, joint-stock companies and insurance companies within the several States without regard to the amount which will be contributed from each State, which amount may and in most cases will be all out of proportion to the number of inhabitants.

It follows that if the Corporation Tax Law seeks to impose a *direct tax* upon the Park Realty Company, that it is repugnant to the Constitution. The proposition is thus reduced to this: Does the Corporation Tax Law provide for a *direct tax* upon the appellee?

It will be observed that the corporation is required

to pay a tax "equivalent to one per centum upon the entire *net income* over and above five thousand dollars."

The income of the appellee in this case is derived entirely from the rent of real estate.

B.

A Tax on the Net Income of Real Property is a Direct Tax.

A tax upon land is a direct tax. This principle has been repeatedly avowed by the Supreme Court even in the cases which may be adduced to lend support to the contentions of our opponents.

Hylton v. United States, 3 Dallas 171.
Veazie Bank v. Fenno, 8 Wall 533;
Springer v. United States, 102 U. S. 586.

In deference to this principle, moreover, all of the taxes which the Federal Government has laid upon the land itself, have been laid by the rule of apportionment.

In the *Income Tax Cases* decided by this Court, March 18, 1895, and upon rehearing May 20, 1895, with respect to the general income tax law which was part of the tariff bill of 1894, it was adjudicated that a tax upon the income derived from real estate is indistinguishable from a tax on the real estate itself and is a direct tax and if not apportioned is unconstitutional.

In pronouncing the judgment of this Court upon the first hearing, Mr. Chief Justice Fuller said:

> "We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the Constitution, and is invalid."
>
> *Pollock v. Farmers L. & Tr. Co.*, 157 U. S. 429 at p. 583.

In the earlier *Pollock* case, Mr. Justice Fuller in a most exhaustive analysis considered all of the decisions

brought to the attention of the Court at that time with this result:

> "Be this as it may, it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land."
>
> Id. 157 U. S. p. 579.

After a thorough reconsideration of the case, Mr. Justice Fuller, in the prevailing opinion, announced the decision of the Court in these words:

> "Our conclusions may, therefore, be summed up as follows:
>
> "First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes."
>
> "Second. We are of opinion that taxes on personal property or on the income of personal property are likewise direct taxes."

The court further held that the entire scheme of taxation was invalid because of these unapportioned, unconstitutional taxes.

> *Pollock v. Farmers L. & Tr. Co.* 158 U. S. 601 at p. 637.

It is assumed that the propositions decided by the *Pollock* cases will be applied to the case at bar without reargument thereof.

C.

The Tax Imposed by the Corporation Tax Law is upon the Net Income of the Appellee.

THE FACT THAT THE TAX IS DENOMINATED "A SPECIAL EXCISE TAX WITH RESPECT TO THE CARRYING ON OR DOING BUSINESS" IS NOT CONTROLLING.

In the first clause of the eighth section of Article I of the Constitution, Congress is given power

"To lay and collect taxes, duties, imposts and excises" subject to the limitation that "all duties, imposts and excises shall be uniform throughout the United States." In view of the holding of the court that those taxes which are thus required to be "uniform throughout the United States" are indirect and need not be apportioned, and that there is no tax which is not subject either to the rule of apportionment or the rule of uniformity (*Pollock v. Farmers Loan & Trust Company,* 157 U. S. at p. 557) it was evidently thought necessary to characterize this tax as an "excise" to break the force of the argument that it was actually a tax on income of land and personal property and therefore a direct tax.

The Century Dictionary defines "excise" as

> "An inland tax or duty imposed on certain commodities of home production and consumption, as spirits, tobacco, etc., or on their manufacture and sale."

The Standard Dictionary as,

> "A charge levied upon commodities of domestic production; an internal revenue tax."

And "Words and Phrases" says:

> "An excise duty is an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities." (Citing *Pollock vs. Farmers Loan & Trust Co.,* 158 U. S. 601, *Patton v. Brady,* 184 U. S. 608.)

Bouvier's Law Dictionary adopts the definition of Blackstone, Comm. Vol. I, p. 318:

> "An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon

the retail sale, which is the last stage before the consumption."

The foregoing definitions of "excise" by the authorities usually accepted as interpreters of the English language demonstrate that the term "excise" is wholly inapplicable to this tax. The Corporation Tax Law does not seek to impose a tax upon commodities or upon their manufacture and sale, or upon licenses to pursue a trade or to deal in certain commodities. It lays a tax upon corporations, joint-stock companies, associations, and insurance companies, regardless of what they produce or in what they deal and regardless, indeed, of whether they produce anything or deal in anything. We do not believe it possible, by the most elastic interpretation, to class the tax sought to be imposed upon the appellee, which does no business except to lease the real estate it holds, within any of the definitions of "excise" quoted.

We are thus brought face to face with the proposition that Congress, in a tax law, by the use of words wholly inapplicable to the subject matter of the tax, can classify a tax which would otherwise be direct as indirect and thus take the law in question out of the operation of a Constitutional provision.

If Congress by the use of phraseology itself conformable to the Constitution, but inappropriate to the object sought to be obtained, can give validity to a Statute which would otherwise be invalid, and accomplish an unconstitutional result, an easy method is provided to do away with all constitutional limitations and restrictions. An unapportioned tax on real estate might be sustained if referred to in the Act creating it as an "excise." A duty on exports might be saved by denominating it an "impost." Nor would such a mischievous principle necessarily stop with tax legislation. Congress might establish

a national religion if the act were designated one "to promote the progress of science and useful arts." Persons might be deprived of property without due process of law under a statute purporting to borrow money on the credit of the United States.

In *Henderson v. Mayor of New York et al.*, 92 *U. S.* 259, the legislature of New York attempted to make the steamship companies pay a tax on immigrants introduced by them, providing that steamship companies should give a bond of $300 for four years for each immigrant landed, conditioned that the immigrant would not become a charge, but that the owner or consignee might commute such bond and be released from giving it by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. This Court, through Mr. Justice Miller, deemed the alternative of giving the bond so arduous, that it would practically never be complied with and said (p 268):

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owner of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*."

The case of *Collins v. New Hampshire*, 171 U. S. 30, is another instance of an attempt to elude the Constitution by the use of ingenious language. The legislature of New Hampshire sought to prohibit the sale of oleomargarine

as a substitute for butter, unless the oleomargarine was of a pink color. This Court held the statute to be in contravention of the Section giving power to Congress "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

The late Mr. Justice Peckham, writing the opinion, said (p. 33):

> "This statute is in its practical effect prohibitory. It is clear that it is not an inspection law in any sense. * * Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson v. Mayor of New York,* 92 U. S. 259; *Morgan's Steamship Co. v. Louisiana,* 118 U. S. 455, at 462."

In the case of *Brown v. Maryland,* 12 Wheat 419, Chief Justice Marshall, in holding that a state tax was upon imports and therefore unconstitutional, although nominally upon the occupation of an importer, said (p. 444):

> "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general,

as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

The words of Mr. Chief Justice Fuller in the prevailing opinion in the *Pollock* case, in which he rejected the theory that a tax on the rents and profits of real estate was any less a direct tax because denominated a tax on "income" appear to us to have equal application to our question, whether such a tax is any less a direct tax because styled a "special excise tax." He said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by reported decisions of this court."
>
> 157 U. S. at p. 581.

Without further citation of authority, it may fairly be said that this court, in determining whether a given enactment comes within a constitutional provision, has adopted the rule that it is the reasonable and natural effect of the act which determines its character rather than the language in which it is couched. There is, therefore, no magic in the use of the words "special excise tax with respect to the carrying on or doing business" which can transmute this tax from a tax on net income of property to an excise tax on doing business (whatever that may mean), if the natural and reasonable effect of the law is to tax net income, or which can remove the case from the operation of the principle laid down in the *Pollock* decision.

If the law in question had imposed a general income tax and then exempted individuals and co-partnerships could it be contended that the effect of such a law would be one whit different or that there was any real difference in the character of such laws?

Obviously the terminology employed is not controlling of the character of the law as a subject for judicial inquiry and this is especially so where, as has been shown, the description is wholly inappropriate.

THE TAX IS NO LESS AN INCOME TAX BECAUSE LAID ONLY UPON CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS AND INSURANCE COMPANIES.

If then, the character of the tax is not to be determined by the words employed to describe it but rather by the "natural and reasonable effect" of the statute, we have to inquire whether the "natural and reasonable effect" of the Corporation Tax Law is to tax anything else but net income.

The tax is stated to be imposed "with respect to the carrying on or doing business by such corporation, joint-stock company or association or insurance company." The following colloquy which took place in the Senate with reference to the paragraph of this bill is illuminative on this point:

> Mr. Borah: For the purpose of information, I should like to know the Senator's views as to what is taxed under this amendment—what is it that we lay this tax upon?
>
> Mr. Flint. The privilege of doing business.
>
> Mr. Borah. The privilege of doing business as a corporation or the privilege of doing business?
>
> Mr. Flint. The privilege of doing business.

Mr. Borah. As a corporation, or simply doing business?

Mr. Flint. Simply doing business.

Mr. Borah. That is all.

Cong. R. v44, p. 4033.

The suggestion is thus presented that the tax is not upon the net income but upon the "carrying on or doing business" and measured by the net income. The Corporation Tax Law was in this respect evidently patterned after section 27 of the act of 1898 imposing a tax upon sugar refiners and oil refiners and which was held constitutional by the court in the case of *Spreckels Sugar Rfg. Co. v. McClain,* 192 U. S. 397 as a tax upon the privilege of doing business.

It is important to note, however, that the Corporation Tax Law does not impose a tax upon the carrying on or doing any particular business, while, like the *Spreckels* case, the decisions which sustain taxes as indirect because upon the privilege of doing business all have reference to a particular business or occupation.

In *Pacific Insurance Co. v. Soule,*7 Wall,433, a tax upon the amounts insured, renewed and continued by insurance companies, on the gross amount of premiums received on dividends, undistributed sums and income was sustained and held not a direct tax. The operation of the Corporation Tax Law is not limited to insurance companies, nor, in the case of insurance companies is the tax limited to income from the insurance business.

In *Veazie Bank v. Fenno,* 8 Wall, 533, a tax upon the circulation of state banks was said not to be a direct tax though the court finally placed the power to lay the tax in question upon the "uniform currency" clause of the Constitution.

In each of the instances cited in which an unapportioned tax has been upheld as a tax upon the privilege of doing

business, the tax has been imposed upon the profits resulting from doing some particular kind of business. In the *Pacific Ins. Co.* case it was upon conducting the business of insurance, in the case of *Bank v. Fenno* it was upon the business of circulating notes, and in the *Spreckels* case, the duty was upon the business of refining sugar or refining petroleum. The Corporation Tax Law puts a tax upon corporations, joint-stock companies, and insurance companies, altogether irrespective of what business they are engaged in. It taxes the net income from all sources, from investments, from accumulated funds or surplus, as well as from the business to carry on which the body corporate was organized. The tax is not measured by the profits of the business but by the income from all sources. Having in mind the definition of "excise" as a tax "on certain commodities" or "on their manufacture and sale" or "upon licenses to pursue certain trades or deal in certain commodities" the line of demarcation between the cases cited and that at bar is very apparent.

Patton v. Brady, 184 U. S. 608, sustained a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured and sold, for consumption and sale, the court holding the tax was not direct because (p. 619) "it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use." This language is quoted in the *Spreckels* case in aid of the decision there reached with respect to the tax on the business of refining sugar. This shows distinctly that this court, in the *Spreckels* case, did not so enlarge the doctrine of prior decisions as to authorize an excise tax upon doing business generally but, following *Patton v. Brady,* regarded the tax as being strictly with respect to the commodity dealt in.

A TAX UPON DOING BUSINESS IS MEASURED NOT BY NET INCOME BUT BY GROSS RECEIPTS.

Mr. Justice Harlan, writing the opinion in the *Spreckels* case points out a clear line of distinction between that case and one such as this. He says (p. 411):

> "Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing business of refining sugar. It cannot be otherwise regarded because of the fact that *the amount of the tax is measured by the amount of the gross annual receipts.*"
>
> (Italics are ours)

Mr. Justice Harlan had in mind, probably, the decision in the *Pollock* cases from which he was distinguishing the facts of the *Spreckels* case, and does he not here indicate a fair test whether the tax is an income tax or upon the privilege of doing business? It will be remembered that in the case which sustained a tax on the insurance business (*Pacific Ins. Co. v. Soule*) the tax was laid on premiums earned, not on net income or net receipts. And the tax on circulating notes taxed every note "used for circulation and paid out" regardless of what gain the bank might make from its issuance (*Veazie Bank v. Fenno*). In none of the instances where a tax on business has been sustained was the tax measured by net income. It is easy to see with regard to the sugar refining business, that if a tax is imposed upon participation in that business, it would be imposed upon gross receipts from the business more naturally than upon net income, which would depend to a great extent upon an economy of policy, the employment of labor saving devices, a close supervision and the precautions to guard against waste and would therefore be a far less accurate test of the extent to which the concern participated in the particular business. If the tax were imposed on business generally,

moreover, it would seem that the gross receipts would be a more correct measure of the participation in business of the corporation, joint stock company or insurance company. If the tax sought to be imposed herein were really upon "the carrying on or doing business" it would be measured not by net income but by gross receipts.

Gross receipts are a measure of the business done, which includes expenditures and the business of expending as well as the business of receiving. Net receipts or net income excludes as a subject of taxation both the business of expending and receiving, and is a measure only of the earning power of the capital invested applied to the business carried on.

The decision in *Nicol v. Ames*, 173 U. S., 509, will be discussed hereafter in its relation to another phase of this case. For the present, it is sufficient to point out that nothing is there decided which is in conflict with the argument here advanced. The Court found the tax there imposed was "in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act." An inspection of the statute there upheld will show that its operation was very limited, for it taxed a particular business, to wit, the sale of products and merchandise, only when transacted in a particular way, by employment of the facilities of exchanges or boards of trade. That is quite different from taxing all the business of corporations and similar bodies subject to the Corporation Tax Law in whatever manner transacted.

THE TAX IS NOT UPON THE PRIVILEGE OF DOING BUSINESS AS A CORPORATION.

It may be contended that what was sought to be taxed herein, was the privilege or facility of doing business in a corporate capacity. Hereafter in this brief we shall discuss the constitutionality of the Corporation Tax Law in that aspect. But that, we consider, is not the correct view of this law for the following reasons:

(1) The tax is imposed on joint stock companies and associations, as well as corporations.

(2) That the tax was upon the privilege of doing business in a corporate capacity, was expressly disavowed by those responsible for the passage of the Corporation Tax Law at the time of its enactment. (See portion of Congressional Record quoted supra.)

(3) The tax is stated to be "with respect to the carrying on or doing business," and does not purport to be a tax on such an "opportunity or facility" as was found to be the subject matter of the tax in *Nicol v. Ames*, and of which the Court there said (p. 519):

> "It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself."

A corporation, as such, possesses no "opportunity or facility" for doing business not possessed by a private individual.

(4) Throughout the history of jurisprudence, a corporation has been regarded as an artificial person having substantially the same legal attributes as other persons and not as a mere facility for other persons to do business. *Dartmouth College v. Woodward*, 4 Wheat 518. *Re Gibbs Estate*, 157 Pa. St. 59.

Professor Rudolph Sohm in his Institutes of Roman Law, in describing the Roman corporation, from which our notion of a corporation is taken, says (pp. 104-6):

"It represents a kind of ideal private person, an independent subject capable of holding property, totally distinct from all previously existing persons, including its own members. It possesses, as such, rights and liabilities of its own. It leads its own life, as it were, quite unaffected by any change of members. It stands apart as a separate subject or proprietary capacity, and, in contemplation of law, as a stranger to its own members. The collective whole, as such, can hold property; its property, therefore, is, as far as its members are concerned, another's property, its debts another's debts."

The principle that a corporation is a person or entity distinct from the persons incorporating has been given especial significance in the tax measures of the States which have uniformly assessed the real and personal property of a corporation to the corporation rather than the incorporators.

(5) If the tax were upon the privilege of doing business in a corporate capacity, it would more likely have been measured by the capital stock issued or the dividends paid, in conformity with the franchise taxes of the States, than by the net income.

If, then, the natural and reasonable effect of the provisions of the Corporation Tax Law is not to place a tax upon the carrying on or doing of any particular kind of business, nor yet to place a tax upon the carrying on or doing business in a corporate capacity, there remains to consider whether there is left any virtue in the suggestion that the tax is upon "simply doing business." It is apparent that the discussion is again reduced to a mere question of terminology. For if a tax on a limited number of persons measured by their net income may be sustained as a tax on doing business irrespective of the kind

or extent of business done or the capacity in which it is transacted, there is no reason why a tax on all persons measured by their net income should not be upheld as a tax on doing business. Such a doctrine would deny all validity to the *Pollock* dicisions. In such case, the general income tax of 1894 would have been valid in all respects if it had been stated to be laid on doing business.

A CONCLUSIVE REASON WHY THIS TAX IS NOT UPON THE PRIVILEGE OF DOING BUSINESS OR UPON "SIMPLY DOING BUSINESS" IS THAT THE TAX IS NOT LIMITED TO THE INCOME DERIVED FROM BUSINESS.

It has become well recognized in our law that corporations may make investments within their corporate powers, but outside of the ordinary transaction of their business and that in making such investments and in receiving income therefrom they are not in a legal sense doing business, any more than an individual would be deemed to be doing business under the same conditions.

Thus in *People ex rel Singer Mfg. Co. v. Wemple* 150 N. Y. 46, the Court of Appeals of New York held that a New Jersey coporation which was principally engaged in manufacturing, which had invested $900,000 of its surplus earnings in real estate in New York City and was receiving the rentals therefrom, was not with respect to such real estate carrying on business within the State and that such $900,000 was not liable to taxation as capital employed in doing business. The Court said per Bartlett, J., p. 49:

> "We are of opinon that the amount represented by the real estate was no portion of the capital stock employed within this state even if the $900,000 was

a part of the capital stock of the company; it was an independent investment, and was in no sense employed within this state in the transaction of the ordinary business of the relator. (*People ex rel. The Southern Cotton Oil Company v. Wemple,* 131 *N. Y.* 64.) If at any time the whole or any portion of this real estate should be used by the relator in carrying on its business in this state a different question would be presented, which need not now be considered."

Similarly in *Coal & Mining Co. v. Ladd,* 160 Missouri 435, the Supreme Court of Missouri held that a New York corporation chartered for the mining and sale of coal, which had ceased mining within the State and leased its lands for agricultural purposes, was not doing business within the State so as to require a certificate of authorization as a prerequisite to maintaining suit in the Courts of the State with respect to said lands. The Court said per Burgess, J., at p. 442:

"The fact that plaintiff has leased its lands to tenants for agricultural purposes since it ceased 'the mining and sale of coal and the manufacture of coke therefrom,' is not 'doing business as a corporation,' within the meaning of the act."

In *Gilchrist v. Helena eta. R. R. Co.,* 47 Fed. 593, it was held that a New York trust company which purchased bonds of a railroad company operating in Montana and took a mortgage to secure them was not doing business within the state of Montana and might sue to foreclose the mortgage without having first obtained a certificate authorizing it to do business.

These cases on the question whether a foreign corporation is doing business within a given state show very clearly that, just as an individual, a corporation may make investments and derive income therefrom without

engaging in business. Indeed it is quite possible that a corporation may derive a substantial income without doing any business whatsoever. In the report of the Missouri case it nowhere appears that the mining company was doing any mining outside of the State, and if it did none, there is a clear cut instance of a corporation doing no business and yet having a net income. It would appear to us that a corporation which did nothing but hold railroad bonds or similar securities and receive the interest thereon, or one which merely held patent rights and received the royalties would furnish an instance of such an "incorporated gentleman of leisure". It is doubtful if the appellee which does nothing but receive the rental from the land of improved real estate it has leased can properly be spoken of as "doing business."

There can be little doubt that such corporations are subject to taxation under the Corporation Tax Law, for the only test set up as determining the liabilities of a corporation is whether it has a net income over $5,000 and certainly a corporation must pay a tax on its net income irrespective of how much or how little is derived from doing business for the law expressly says that the tax is to be "equivalent to one per centum upon the entire net income over and above five thousand dollars *received by it from all sources* during such year." We have thus the anomalous condition of a tax imposed upon "simply doing business" measured by income which is not determined by the income derived from business and must be paid irrespective of whether the corporation is engaged in business or not.

It is submitted that the tax under discussion not being upon the carrying on or doing of any particular kind of business, nor yet upon the doing of business in any particular way, and not being imposed upon gross receipts as has been the invariable rule with business taxes, and

being imposed irrespective of the extent to which the corporation engages in business and falling upon net income from invested property, is not a tax on carrying on or doing business, but is an income tax.

THE NATURAL AND REASONABLE EFFECT OF THE CORPORATION TAX LAW IS TO TAX NET INCOME.

If the tax is not in fact upon business and its description as a "special excise tax with respect to the carrying on or doing business" cannot avail in the face of the fact to make the tax one upon business, it follows that the tax must be upon income. A tax measured by net income which was confined in its operation to bachelors or to persons between certain ages would undoubtedly be considered an income tax. Aside from the fact that the tax under discussion is limited to a certain class of persons it is dependent upon no other element than the amount of income enjoyed by them. Certainly the "natural and reasonable effect" of the Corporation Tax Law is to tax net income.

Henderson v. May of New York 92 U. S. 259.
Collins v. New Hampshire 171 U. S. 30
Brown v. Maryland 12 Wheaton 419
Pollock v. Farmers L. & T. Co. 157 U. S. 429.

The efforts of the framers of this law to take it out of the operation of the Pollock decisions have been fruitless. There can be no difference between a tax "of one per centum upon the net income" and a tax "equivalent to one per centum upon the net income". The language employed is an effort by a circumlocution to render of no effect a solemn adjudication of this Court. Here is simply an income tax imposed upon less than all the total number of inhabitants.

The tax being upon income which, in the case of the appellee, is derived wholly from real estate, it is with respect to the appellee, a direct tax and not being apportioned among the several states, unconstitutional and void.

POINT II.

If the Tax imposed upon the Appellee by the Corporation Tax Law is not upon Income, it is a Tax upon the Franchise to be a Corporation, and as such, void, because in conflict with the Implied Limitations upon the Taxing Power contained in the Constitution.

Under the preceding point we have maintained that the tax in question is invalid because a tax on the income derived from real and personal estate, and therefore a direct tax, which being unapportioned, must be held to be unconstitutional. If, however, it shall be the view of this Court that the tax is not upon net income, but is upon "the carrying on or doing business" in a corporate capacity, it is submitted that the tax must still be held to be unconstitutional, because such an interpretation would place the tax upon the corporate franchise, and the corporate franchise is exempt from taxation by reason of the implied limitations on the taxing power which are drawn from the dual character of the system of government recognized in the Constitution.

A.

If the Tax is not upon Net Income it is upon the Franchise to be a Corporation.

If the tax is not to be regarded as an income tax limited in its operation to corporations and similar

bodies, but is a tax upon some sort of privilege to do business, it is quite evident that the character of that privilege is to be determined by the element the presence or absence of which determines the liability to the tax. This feature with respect to the persons made subject to the Corporation Tax Law is the fact of the possession of a franchise to be a corporation or the right to do business as a joint stock company or association. In other words, a tax upon the privilege of carrying on or doing business by a corporation or a similar body can be nothing more nor less than a tax on the right or franchise to be a corporation or a similar body and to do business in a corporate capacity.

Considering the Corporation Tax Law as imposing a tax upon the corporate franchise, we contend that it is unconstitutional because in violation of the implied limitations in the Constitution upon the taxing power of the Federal Government.

It appears from the allegations of the bill (fol. 4) that the Appellee is a corporation duly organized and existing under and by virtue of the Laws of the State of New York, and it further appears (fol. 6) that the operations of said Appellee have been conducted wholly within the State of New York. It must be observed that the tax sought to be imposed herein cannot be sustained under any theory predicated upon the powers conferred to regulate commerce with foreign nations, or among the several States, or with the Indian tribes, for the reason (fol. 6) that the Appellee is not engaged in any such commerce.

B.

The Federal Government and the Government of the States are, within their Respective Spheres of Action, Mutually Independent and,

because of such Independence, the Taxing Power of Each is Limited in that Neither may Tax the Agencies of the Other.

The Tenth Amendment to the Constitution of the United States provides:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

This amendment indicates the line of demarcation between the respective spheres of action of the National Government and the government of any state.

From the very first the idea has been entertained that the Federal and State Governments have different functions to perform and hence neither is subordinate to the other. Madison said in "The Federalist" (No. XLVI):

> "The Federal and State governments are in fact but different agents and trustees of the people constituted under different powers and designated for different purposes."

That the Federal and State Governments are independent of each other is a doctrine to which this Court has uniformly adhered. In *The Collector v. Day*, 11 Wallace, 113, Mr. Justice Nelson said (page 124):

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved', are as independent of the general government as that government within its sphere is independent of the States."

One of the cardinal principles which this Court has adopted in its interpretation of the Constitution is that

neither government should be allowed in any way to burden, impede or hamper the functions of the other. The adoption of this principle has been deemed necessary in order to avoid conflict or friction between the officers of the respective governments and to maintain that harmonious system which it was the desire of the framers of the Constitution to erect.

In former times, before the national idea had become as prominent as it is to-day, this Court was more frequently called upon to safeguard the powers of the National Government from encroachment by the States. *M'Culloch v. Maryland,* 4 Wheaton, 316, is the leading case among those decisions of this Court which upheld and maintained the prestige of the National Government and rejected the theory that the National Government was dependent for its very existence upon the grace of the individual States. In that case, it was held that Congress might incorporate the Bank of the United States and, when so incorporated, the Bank and its branches were exempt from taxation by the State of Maryland. In support of the principle of the independence of the Federal Government of the States there announced, Chief Justice Marshall said (page 430):

> "We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one govern-

ment to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

It is quite apparent from this language that the Chief Justice had in mind not only the freedom of the Government from State taxation but also the exemption of the agencies of the State from federal taxation, and that his decision involved the idea of mutual independence and thus indeed subsequent cases have interpreted the decision.

With regard to the effect of permitting the State to impose a tax such as the one then under discussion, Chief Justice Marshall had this to say (page 432):

> "If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

THE STATES HAVE BEEN UNIFORMLY HELD WITHOUT POWER TO TAX THE INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT.

In *Osborne v. The Bank,* 9 Wheaton, 738, the principles laid down in *McCulloch v. Maryland* were reconsidered and emphatically endorsed. It was again held that a State was without power to tax the Bank of the United States—Chief Justice Marshall writing the opinion.

Similarly in *Weston v. Charleston,* 2 Peters, 449, it was held upon the authority of *M'Culloch v. Maryland,* that the stock of the United States was not subject to be assessed for taxation, and in *Dobbins v. Commissioners of Erie County,* 16 Peters, 435, the office of captain of a revenue cutter of the United States was held not liable to be assessed for taxes under the laws of Pennsylvania.

Again in *Bank of Commerce v. New York City,* 2 Black, 620, it was held upon the authority of *M'Culloch v. Maryland* that a statute of the State of New York laying a tax upon the capital of corporations was invalid with respect to the relator, in so far as it sought to tax that part of the capital represented by investments in stocks, bonds and securities of the United States. Substantially the same thing was held in the *Bank Tax Case,* 2 Wallace, 200.

Upon the same theory, certificates of indebtedness issued by the United States were held exempt from state taxation in *The Bank v. The Mayor,* 7 Wallace 16, and in *Bank v. The Supervisors,* 7 Wallace 26, United States notes issued under the Loan and Currency Act were held to be entitled to the same exemption and for the same reasons.

It thus appears that this Court has, by an uninterrupted line of decisions following *M'Culloch v. Maryland,* settled beyond the possibility of dispute at the present time, that the means and instrumentalities employed by the Federal Government in the exercise of its powers and functions are, because of the complete independence of that Gov-

ernment from the States, not subject to any exercise of sovereignty by the States, nor liable to be taxed by them, in whatever manner the tax is imposed.

THE DECISIONS WHICH, FOLLOWING *M'Culloch v. Maryland*, MAINTAINED THE EXEMPTION OF THE AGENCIES OF THE FEDERAL GOVERNMENT FROM TAXATION, WENT UPON THE PRINCIPLE THAT FEDERAL AND STATE GOVERNMENTS WERE INDEPENDENT OF EACH OTHER AND NOT UPON ANY SUPPOSED SUPREMACY OF THE FEDERAL GOVERNMENT.

Chief Justice Nelson, in *Bank of Commerce v. New York* (supra) after quoting the language of Chief Justice Marshall in the *M'Culloch* case, said (page 635):

> "All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two Governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to any one of the great departments of Government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

Chief Justice Chase writing the opinion in *Texas v. White*, 7 Wallace, 725, gives a very clear notion of the place and function of the States in our form of government and shows that this Court is committed to the principle here contended for. He says (page 725):

"But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, not prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in Union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but *it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.* The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible states." (Italics are ours.)

THE SAME PRINCIPLE WHICH DENIES TO THE STATES THE RIGHT TO TAX THE AGENCIES OF THE FEDERAL GOVERNMENT EXEMPTS FROM FEDERAL TAXATION THE MEANS AND INSTRUMENTALITIES EMPLOYED BY THE STATES IN THE EXERCISE OF THEIR POWERS AND FUNCTIONS.

A great authority upon Constitutional Law says:

"If the States cannot tax the means by which the National Government performs its functions, neither, on the other hand and for the same reasons, can the latter tax the agencies of the State governments."

Cooley on Constitutional Limitations, (7th Ed.) page 683.

This principle has become so well established by the adjudications of this Court that it is not open to question.

The Collector v. Day, 11 Wallace 113, decided, upon the authority of *M'Culloch v. Maryland* and the other cases cited above with respect to the implied limitations upon the taxing power of the States, that Congress could not include in a general income tax the salary of a judicial officer of the State of Massachusetts. Mr. Justice Nelson in the prevailing opinion, page 127, said:

> "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempted from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and intrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at

the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The same result was reached in *United States v. Railroad Company,* 17 Wallace, 322, where the Court held that interest on bonds of the City of Baltimore, which had been issued for the purpose of a loan to the Baltimore and Ohio R. R. Co., was not taxable in the hands of the railroad company by virtue of a Statute authorizing the railroad to retain and turn over to the government five per cent of all interest paid by it.

In *Pollock v. Farmers' Loan and Trust Company,* 157 U. S., 429, it was held that the general income tax of 1894 so far as it was sought to lay a tax upon the income of municipal bonds was unconstitutional, Chief Justice Fuller saying (page 583):

"The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers.

As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

The case of *Ambrosini v. United States,* 187 U. S., 1, decided that a person giving a bond as is required by the Laws of Illinois to obtain a liquor license was not obliged to place a revenue stamp thereon under the War Revenue Act of 1898, Chief Justice Fuller saying (page 7):

"The general principle is that as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the States, so are

those of the States exempt from taxation by the general government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter. Nelson, J. *The Collector v. Day,* 11 *Wall,* 113."

WHENEVER THIS QUESTION HAS COME BEFORE THE STATE TRIBUNALS THEY HAVE UNIFORMLY MAINTAINED THAT THE FEDERAL TAXING POWER DOES NOT EXTEND TO THE MEANS AND INSTRUMENTALITIES EMPLOYED BY THE STATES IN THE EXERCISE OF THEIR GOVERNMENTAL FUNCTIONS.

The Supreme court of Wisconsin has spoken several times upon this subject. In *Jones vs. Estate of Keep,* 19 Wis., 390, it was held that the fact that no revenue stamp had been affixed to the appeal papers as required by the Act of Congress of 1862 did not warrant a dismissal of the appeal, because Congress was without power to impose a tax upon the writs and processes of the State Courts, which view the Court deemed to be a logical result of *M'Culloch v. Maryland* (supra). The Court said, per Cole, J, page 394:

"The soundness of this general reasoning may be fully admitted, and still it does not establish the power of congress to impose a tax upon the writs and processes of state courts. The argument must be pushed still further, and it must be shown that Congress has not only an unlimited power to tax the property of the country and other subjects to which the power of taxation is applicable, but that it can directly tax the means employed by the states in the exercise of their governmental functions. Is there no limitation upon the power of taxation,

which all concede is vested in the general government, and may it be applied to all subjects within the discretion of Congress?"

And again, on page 395:

"From this it follows, that there must be some limit to the taxing power on the part of the states and that of the general government. Such limitations must necessarily exist, for an unlimited power to tax on the part of one, is incompatible with the existence of the other. For if an unlimited power of taxation on the part of Congress be established—if it may require a writ of a state court to be stamped—it may likewise say that an act of the state legislature, a commission or pardon issued by the governor, shall have no effect unless stamped. Congress may tax any and all the means employed by state governments in the execution of their powers. The assertion of such a power is hostile to the states and repugnant to the fundamental principles and maxims of our system of government."

Following this, the Court held, in *Swift vs. Cornes,* 20 Wis., 397, that Congress could not require a stamp to be affixed to a notice of appeal, and, upon the authority of *Jones vs. Estate of Keep,* the Court held, in *Sayles vs. Davis,* 22 Wis., 217, that a tax deed given under a sale of land for the non-payment of taxes was not required to be stamped, although included within the terms of the Federal Statute, the Court saying per Dixon, C. J., at page 221:

" 'The power to tax involves the power to destroy; and the power to destroy may defeat and render useless the power to create'. The functions of government exercised in the levying and collection of its taxes are more vitally important to its existence

and independence than any other. Without the free and unobstructed exercise of such power no state can exist, and all sovereignty and independence are at an end. We cannot but regard this as an obvious departure from the spirit and requirements of our federal constitution, and contrary to the intention of the convention which framed, and of the states which ratified it."

The Supreme Court of Michigan took the same view of the matter in *Fifeld vs. Close*, 15 Mich., 505, and held that the Act of Congress taxing the process of State Courts was unconstitutional, and refused to dismiss a case because no stamp was affixed to the summons. The Court said, pages 505-507:

> "The power of Congress to impose such a charge, as a condition upon litigation, is denied by the plaintiff in error as inconsistent with the control which the Constitution of the United States guarantees to the State authorities over all such matters as has been left by that instrument under local regulation. * * *
>
> "If Congress has the right to impose a duty or tax upon suits in courts of the states, it follows as an inevitable conclusion, that such restrictions may be laid upon these proceedings as to put an end to the entire action of those courts, and, for all practical purposes, to produce the same results as if they were abolished. And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the states."

And again, on page 508:

> "The same supreme power which established the departments of the general government, determined that the local governments should also exist for their

own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the constitution which can be made to admit of any intereference by congress with the secure existence of any state authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the national legislature as if the interference were direct and extreme.

We are not, therefore, at liberty to give weight either to the moderate amount of the tax, or to the solicitude manifested by Congress to exempt those cases more immediately concerning the state as a community." (Italics are ours.)

The Supreme Court of Judicature of Indiana, also in *State ex rel Lakey v. Garton*, 32 Ind. 1, decided that a Sheriff's official bond was not a subject for taxation by the Federal Government and was valid although unstamped. Mr. Justice Ray, writing the opinion, after citing *M'Culloch vs. Maryland*, (supra), said, page 7:

"The principle which operates as a limitation upon the power of the state to tax the agencies and minute machinery employed by the general government to carry out its constitutional functions, must in turn equally restrain the power of Congress to tax, to trammel, or destroy, the means used by the state to perpetuate an existence as sacred under the Constitution as the national life, because a constituent of that life."

It thus appears that by the decisions of this Court and also by the decisions of the highest courts in several

of the States, it has been definitely settled that as the State legislatures are without power to place a tax upon the instrumentalities employed by the Federal government in exercising its powers and functions, so Congress may not tax the instrumentalities employed by the State governments to perform their governmental functions.

THE DECISION IN *South Carolina vs. United States* 199 U. S. 437 IS NOT ADVERSE TO OUR CONTENTION.

The powers of the general government with respect to the taxation of the agencies of the States are clearly defined and as clearly limited by this case. It is there established that when a state, even in the exercise of its paramount police power, engages in private business, even of an exclusive nature, the salaried agents of the State in carrying on that business are subject to a license tax, uniform in its application to dealers in intoxicating liquors throughout the United States. This is by reason of the fact that the power of the Federal government to lay uniform excise taxes affects business carried on by the State, even though connected with the exercise of the police powers. The principle is recognized, however, that the taxing power of the Federal government does not extend to the instrumentality of the State necessary to enable it to discharge its governmental functions.

The court recognized fully the principles above referred to and said (p. 452):

> "In other words, the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the nation is concerned, was affirmed at an early day in the great case of *M'Culloch v. Maryland,* 4 Wheat.

316, in which it was held that the State had no power to pass a law imposing a tax upon the operations of a national bank. The case is similar and needs not to be quoted from. No answer has ever been made to the argument of Chief Justice Marshall, and the propositions there laid down have become fundamental in our constitutional jurisprudence. *Osborn v. Bank of United States*, 9 *Wheat.* 738, *Weston v. City Council of Charleston*, 2 *Pet.* 449; *Bank of Commerce v. New York*, 2 *Black.* 620; *Bank Tax Case*, 2 *Wall.* 200; *The Banks v. The Mayor*, 7 *Wall.* 16.

The court considered the tax (p. 458) to be on "a business" and, of course, what was taxed was not the right of agents of the State to carry on business as such agents, but merely the occupation of selling liquors. The court based its decision upon the fact that, from the very beginning, the Federal Government was recognized as having a power to require liquor licenses and the assumption of the liquor business by the State could not be allowed to affect a source of revenue which had always been recognized as belonging to the Federal Government, for that would be an encroachment upon the Federal power. The case at most constitutes a limitation to the exemption of the instrumentalities of the State from taxation, to wit: That the State cannot by engaging in a line of business, ordinarily taxable, deprive the Federal Government of its accustomed revenue from that source.

This indeed is the view which this court has subsequently taken of that decision, for it said through Mr. Justice White in *Murray v. Wilson Distilling Co.*, 213 U. S. 151, at p. 173:

> "That case was concerned with the power of a State, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy the pre-exist-

ing right of taxation possessed by the government of the United States."

Inasmuch as the Federal Government has never taxed the corporate franchise, it cannot be said that, in setting up the exemption of the franchise to be a corporation from Federal taxation, we are limiting any recognized source of income to the government.

We have then to consider whether the corporate franchises granted by the several States, and which we are now assuming to be the objects of the Corporation Tax Law, are not to be considered as such instrumentalities of the State within the meaning and intent of the decisions just discussed.

C.

The Franchise to be a Corporation is a Means Employed by the State Government in the Exercise of its Powers and Functions.

It is unnecessary to point out that a corporation owes its existence to the State and that in giving birth to a corporation the State perfoms a sovereign function. Chief Justice Marshall said in *M'Culloch v. Maryland,* at page 410:

"The creation of a corporation it is said appertains to sovereignty. This is admitted."

Moreover, in contemplation of law, after a corporation is brought into existence it possesses some of the attributes of the sovereign State which created it. Blackstone defines a franchise as "a royal privilege or branch of the King's prerogative subsisting in the hands of a subject." This Court may take cognizance of the fact that corporate franchises granted by the several states have not merely the character of private property or of personal privileges conferred upon the corporators for their own advantage, but are created to carry out the

governmental purposes of the States respectively in regard to matters of which they have exclusive jurisdiction, involving among other things the ownership of property, the promotion of industry, the character of citizenhood and the development of natural resources.

By way of illustration, we allege that the laws of the State of New York in regard to the organization of corporations, are founded upon considerations of public policy, express the purposes of the State in its sovereign capacity, and are designed among other things,

(1) To encourage and make possible the accumulation of capital for large enterprises, including works of public utility which might not otherwise be undertaken by private capital;

(2) To make the ownership of property and interest therein and particularly of real property more readily divisible and transferable, thereby promoting the extension of such ownerships to a larger body of citizens;

(3) To secure more competent and efficient management of property and to facilitate the supervision of such management on the part of those acting in a representative capacity;

(4) To promote the utilization of new inventions and discoveries, the pursuit of new industries and the seeking of new markets, by distributing the risk involved in such enterprises and limiting the liability of those engaged therein;

(5) To inculcate the habit of co-operation among the citizens and to accustom them to act in an organized capacity, to perpetuate the good-will and trade names of manufacturing establishments and commercial houses;

(6) To avoid the halting of business and the locking up of capital by reason of death;

(7) To obtain information by means of periodical reports in regard to conditions affecting commerce and

industry and to enlarge the revenues of the State by means of taxes and fees imposed as a condition of granting such franchises.

(See allegations of Complainant's Bill, Folio 20 of Record.)

Clearly it would seem as if the corporation, clothed "with a branch of the King's prerogative", and sent out to secure the ends which the State has come to regard as desirable, must be regarded as a governmental instrumentality of the State. *Angell & Ames* in their work on corporations, 10th Edition, page 23, in commenting on the classification of corporations generally prevailing, say:

> "Private corporations are indisputably the creatures of public policy and in the popular meaning of the term may be called public".

And this Court said, in *Hale v. Henkel,* 201 U. S., 43, at p. 74:

> "Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation."

The way in which the corporation is employed as an instrumentality of the government is perhaps best illustrated in the case of public service corporations such as railroads, water, gas, telegraph and telephone companies, which the State creates to perform certain of the functions which States often perform themselves, and in case of trust companies, which by virtue of their character as depositaries and their eligibility as trustees, guard-

ians, etc., prominently assist in the administration of justice. (See the following cases in which it is evident this court considered that supplying water to municipalities was a public function. *Walla Walla case,* 172 U. S. 1; *Los Angeles case,* 177 U. S. 558; *Freeport case,* 180 U. S. 587.) The way in which the governmental purposes of the State are subserved is also clearly shown in the case of realty companies such as the appellee, which, by reason of making real property more readily divisible and transferable, promote the extension of such ownership to a much larger body of citizens than could possibly own real estate under a system of individual ownership, and tend to break up accumulations of real estate in single hands.

It is the part of a government to foster and encourage among its citizens the conditions above enumerated. Such conditions cannot be effectually brought about, except by acts of the sovereign power. When the State creates a corporation for the purpose of producing one of the results enumerated, it calls into being by an act of sovereignty, an instrumentality created to subserve a governmental purpose. "The power to tax is the power to destroy." It has been well said that this statement is applicable only to a subject with respect to which the power to tax exists. While this is true, it is equally true that if the exercise of the power to tax by the Federal Government may lead to the destruction of an attribute of sovereignty of a State, in view of the dual nature of our union, and the indestructible character of such attributes, the power to tax with such destructive result cannot exist.

Mr. Justice White, in *Knowlton vs. Moore,* 178 U. S., 60, says:

> "In other words, the power to destroy which may be the consequence of taxation is a reason why the

right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."

Our contention is, that the right to create corporate or similar bodies is an attribute of sovereignty of the States. That the taxation by the Federal Government of the corporate right to be a corporation, with the accompanying power to tax and destroy the sovereign right of the States to create corporations for governmental purposes and as governmental agencies. This contention does not deny the right of the Federal Government to tax the real and personal property of the corporations, as pat of the property of the country, and their businesses and occupations as part of those of the country, subject to rules of justice, equality and uniformity applicable thereto. It does deny the right of the Federal Government to classify corporations by themselves as doing business as such, for the purpose of taxation, exempting at the same time from the operation of the tax laid upon them, their direct competitors, co-partnerships, and individual citizens.

We consider it to be settled law, that the franchise to be a corporation is an instrumentality of government, by the decision of this court in California v. The Southern Pacific Railroad Company, 127 U. S. 1.

That was a case in which the State of California sought to assess part of the property of the Central Pacific Railroad Company, its franchise to be a corporation and other franchises which had been conferred upon it by Congress. The Court decided that the tax was invalid, Mr. Justice Bradley saying at page 40:

"But may it (the State of California) tax fran-

chises which are the grant of the United States? In our judgment it cannot."

* * * * * * * * *

"No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. * * *

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland,* 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. *To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty.* It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch v. Maryland,* 4 Wheat. 316; *Osborn v. The Bank of the United States,* 9 Wheat. 738; and *Brown v. Maryland,* 12 Wheat. 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson v. Pacific Railroad,* 9 Wall. 579, and *Railroad Co.*

v. Penniston, 18 *Wall.* 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the Company and not upon its franchises or operations. 18 Wall, 35, 37.

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases."

The suggestion has been made that the reason a federal corporation is not subject to taxation by the States is that the sovereignty of the United States is of a higher quality than that possessed by the States, and that whereas the States may not assume to exercise jurisdiction over or levy taxes upon the agencies of the federal government, the federal government is without such limitations. It is obvious that there is nothing in the case of *California v. Southern Pacific Railroad Co.,* just cited, nor in any of the other decisions which we have referred to as applicable to this point, to sustain this view of the matter, but it is worth while to note that this theory was expressly repudiated by this court in the case of *Collector v. Day, supra,* where the court said at page 126:

"The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error in respect to the question before us cannot be maintained. The two governments are upon an equality * * *"

The true principle maintained by the decisions of this court is that both the federal power and the State power are restricted from trespassing upon the sovereignty of each other. It appears, furthermore, that the Supreme Court has adopted this principle as the true interpretation of the provisions of the Constitution, and has denied to the federal government the right to tax the States and their instrumentalities upon the same ground that it has denied to the States the right to levy taxes which would be a burden upon the federal government. It would seem logically to flow from this that a particular kind of agency employed by the federal government and held on that ground to be exempt from State taxation, would, when employed by the State government, be equally exempt from Federal taxation. *As this Court has authoritatively decided that the franchise to be a corporation conferred by Federal Laws is not a subject for taxation by the State legislatures, it follows that the corporate franchise, issuing from a State, is not to be taxed by Congress.*

THERE IS NOTHING IN THE CASE OF *Nicol v. Ames*, 173 *U. S.*, 509, WHICH CAN SERVE AS AN AUTHORITY FOR THE TAX SOUGHT TO BE IMPOSED ON THE APPELLEE HEREIN.

That tax, as has previously been stated, was said by the Court to be "upon the privilege, opportunity or facility offered at Boards of Trade or Exchanges for the transaction of business mentioned in the Act". As has been pointed out, the tax was on the particular manner of doing business, and, therefore, analogous in its character to a tax on doing a particular kind of business, which as we have seen has always been held to be a proper exercise of the taxing power. The case did not decide that a tax might be laid upon the franchise to be a corporation. The Court said at page 517:

"This particular Board is incorporated under an Act of the Legislature of Illinois, though its corporate character does not in our judgment form a material consideration in the inquiry."

The privilege there taxed although conformable to the laws of the State, rested entirely in mutual advantage to the members of the Exchange, and can in no sense be considered as flowing from the sovereignty of the State.

We desire to call the special attention of the Court to the applicability to the question under discussion of the decisions cited above, holding that a tax on the legal process of the States is unconstitutional. In *Fifield v. Close,* the Court, as has been seen, spoke of such a tax as "a condition upon litigation", and in *Jones v. Estate of Keep* it appears to have been contended by counsel that the tax there was imposed upon the privilege of engaging in litigation. It has been contended that a tax upon a corporate franchise is valid because in many cases the chief object to be subserved is the interest of the incorporators. From this point of view, we suppose it might be said that the ordinary civil law suit is of even less public importance than is the business and operations of the ordinary corporation, and yet we find the courts with one accord holding the process issued under the authority of the respective states is exempt from Federal taxation, and it would seem that in like manner the charter of a corporation issuing from the States should be exempt from taxation by the United States.

D

For this Court to Hold that the Corporate Franchise of the Appellee was not Exempt from Federal Taxation would Establish a Dangerous Precedent.

The reason which prompted the court in *M'Culloch v.*

Maryland and in the cases following, to maintain the exemption of the means and instrumentalities of the Federal and State governments respectively against the taxing power of each was not only the fear that the Federal government or State government might be hampered or burdened in the exercise of its functions, but also that, unless such exemption was recognized, the powers and functions of either government would be dependent for their very existence upon the other, as was strikingly said by Chief Justice Marshall at page 431 of the *M'Culloch* case.

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."

The measure which is now under discussion may be the only attempt which is made to encumber the functions of State governments and subject them to Federal domination. It may also be only the first of a series of legislative enactments, which shall have as their object the complete centralization of government in the United States and the relegation of the states to mere political divisions shorn of sovereignty, or indeed of any of the attributes of statehood uniformly held to be guaranteed them by the Constitution under the Tenth Amendment. Such a result would not only be in conflict with the decisions of Chief Justice Marshall and the other jurists who have sat upon the bench of this Court, but would work out an annihilation of local self-government which could not but be regarded as wholly repugnant to the principles gen-

erally understood as lying at the foundation of our Constitution and system of government.

It is respectfully submitted that, in the view that the Corporation Tax Law seeks to impose a tax upon the right of the Appellee to carry on or do business in a corporate capacity, it is unconstitutional because it imposes a tax which is an encroachment upon the rights and powers of the respective States reserved to them by the Tenth Amendment.

POINT III.

The Corporation Tax Law, if the Tax Falls upon "Carrying on or doing Business", must fail for want of Equality and Uniformity, in the Tax thereby imposed.

The first cause of the Eighth Section of Article I. of the Constitution provides:

> "All duties, imposts and excises shall be uniform throughout the United States";

and in the Fifth Amendment, it is declared:

> "Nor shall any person * * be deprived of life, liberty or property, without due process of law."

Complainant's bill alleges violations by the Corporation Tax Law of both these clauses of the Constitution. (Folios 13 to 18 and Folio 25 sub. p. of Record.)

In discussing the constitutionality of the Corporation Tax Law under this head, we are not unmindful of those decisions of this Court (*Knowlton v. Moore, Patton v. Brady, McCray v. United States, Nicol v. Ames*, etc.) which have held that the uniformity mentioned in the first passage of the Constitution quoted, is a geographical uniformity and that a duty, impost or excise is not violative of that clause if it operates alike in all parts of the Union. Giving full weight to these deliverances of this

Court, there is nothing in them opposed to the view that a tax may be so oppressive in its terms and so unequal in its operation as not to be an exercise of the taxing power, but so confiscatory in its nature and operations as to constitute a deprivation of property without due process of law or indeed be violative of "the fundamental principles of equality and justice" upon which the Constitution and the exercise of the power of taxation by the United States rests. Indeed both in *Knowlton v. Moore* (178 U. S. at p. 109) and in *McCray v. U. S.* (195 U. S. at p. 62) this argument was entertained and evidently not thought unreasonable by the Court, though postponed in each instance for future consideration because inapposite to the case at bar.

In declaring an assessment for a public improvement unequal in its operation, and therefore unconstitutional, though no express command of the State Constitution was violated (*Agens v. Mayor*, 37 N. J. L. 415) Beasley, C. J. said (p. 421):

> "In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon a specified property, does not exist."

The Supreme Court of Pennsylvania said of taxation in *Washington Avenue*, 69 Pa. St. 352 at p. 363:

> "But nevertheless taxation *is* bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just limits of what is taxation. Like the rain it may fall upon the people in distrcts and by turns, but still it must be public in its purpose and reasonably just and equal in its distribution, and

cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights."

It is believed that the Corporation Tax Law presents such a case of an unjust and unequal tax as to merit the condemnation of this Court upon the grounds suggested.

The decisions of this Court and of the highest Courts of the States which have interpreted the Fourteenth Amendment to the Constitution of the United States and the various provisions of the State Constitution with respect to "equality" and "uniformity" have held that while the Legislature may adopt a classification for the purpose of taxation, the classification must be a reasonable one, and all of the objects coming within the same class must be taxed alike.

Kentucky R. R. Tax Cases, 115 U. S., 321.
Magoun v. Ill. Tr. & Sav. Bank, 170 U. S., 283.
Cook v. Marshall County, 196 U. S. 261.
Michigan Central R. R. v. Powers, 201 U. S., 24
Adams v. Kuykendall, 83 Miss., 571.
State v. Ide, 35 Wash. 576.

We contend that this rule so uniformly applied to stat taxation is applicable to Federal revenue laws, and fu nishes a measure or test of the inequalities of the Co poration Tax Law, the inequality and oppressiveness which are apparent

A.

The Corporation Tax Law is Unequal in its Operation, in that Taxes Corporations, Joint Stock Companies and Associations, and E empts Individuals and Co-Partnerships Carrying on the same Busin and Deriving Net Income from the same Sources as in the Case of su Bodies.

It is an essential to a just and equal tax, free from t element of arbitrary confiscation of property without d

process of law, that there shall be *equality of burden among direct competitors.* This statute is conspicuously free from observance of this indispensable requisite.

"Taxation and assessment imply apportionment. Each person must share the burdens of taxation and assessment equally with all others in like situation."

Stuart vs. Palmer, 74 N. Y. 189.

If the tax is not upon net income, nor yet upon the privilege of being a corporation and doing business in a corporate capacity, but is simply upon carrying on and doing business, the operation of the law is manifestly unequal in not taxing all who carry on and do business. The statute necessarily creates a class in imposing the tax upon the act of doing business, and all who do business are necessarily included within the class and if, of these, only corporations, joint-stock companies, associations and insurance companies are taxed, there is that arbitrary selection for taxation of some members of a class which has been uniformly condemned.

The bill specifically sets forth (fol. 14) the names of nine hotels which are owned by private individuals, all yielding a larger net income than that of the appellee and all in direct competition with the appellee. In view of the very keen competition in the hotel business in New York, the charge imposed by the Corporation Tax Law may at some future date, under the pressure of some improvement undertaken or loss sustained, be just enough to disrupt the business of the appellee. The soundness of the argument here advanced is not affected by the consideration, if true, that there is small likelihood of such a result under the present law. The sanction by this Court of a tax operating upon so unequal a principle, would open the way for more drastic legislation of a like character, which would render ineffective the constitutional guaranties of property.

A tax law plainly departing from the principle of equality would be obnoxious as contrary to equity and as practical confiscation, and would involve taxing property without due process of law.

In failing to tax co-partnerships and individuals in direct competition with corporations there is inequality and confiscation. We have here a case presented within the language used by Mr. Justice White in *Knowlton v. Moore*, 178 U. S., p. 109, when he said:

> "If a case should ever arise where an arbitrary and confiscatory exaction should arise bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles in the protection of the individual even though there be no express authority in the Constitution to do so."

This tax is as open to condemnation as that declared invalid by the Supreme Court of Washington, in *State v. Ide*, 35 Wash. 576. There a poll tax was laid upon all men over twenty-one and under fifty. The Court said, p. 587:

> "* * * The classification made in imposing this tax is based solely upon age and sex. It has no relation to the property of the persons to be taxed, or to their ability to pay. The persons selected to bear the burden are under no greater obligations to pay for keeping the streets in repair than others who are exempted from the payment of the tax. Does such classification, then, rest upon a reasonable difference between the persons taxed and others who are not taxed?"

Keeping in mind that the tax is now supposed to be upon the carrying on and doing business, there is even less reason for a distinction here than in the *Ide case.*

B.

The Exemptions made in the Corporation Tax Law are such as to Render the Operation of the Law very Unequal.

By the provisions of the law are specifically exempted labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders and associations operating under the lodge system, and providing for the payment of sick, accident and other benefits to the members of such societies, orders or associations and dependents of such members, domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, and corporations and associations organized and operated exclusively for religious, charitable and educational purposes, no part of the net income of which last inures to the benefit of any private stockholder or individual. The bill alleges (fol. 16) that the income of the corporations so exempted often exceeds the income of the appellee. No good reason appears for the exemption of building and loan associations.

C.

The Provision of the Corporation Tax Law which Allows as a Deduction in Computing Net Income Interest on only so much of the Bonded and other Indebtednness as does not exceed the Paid-up Capital Stock, is Unconstitutional for Inequality.

In the cases previously cited, it was held that the classification for the purposes of taxation, which a legislature may make, must be reasonable. We urge that the proportion of indebtedness to capital stock constitutes no basis for reasonable classification. It is entirely without precedent and involves the taxation of corporations having an indebtedness in excess of their capital stock, at a higher rate than that which must be paid by corporations not so indebted. It is a fact of common

knowledge that many corporations are indebted to many times the amount of their capital stock, a fact which does not necessarily affect their solvency, nor has it ever been regarded as the basis for the imposition of a discriminating tax. It is, however, quite possible that the imposition of this tax upon a corporation so indebted, would lay such a burden upon the corporation that it would be compelled to go out of business, or, at least, to give up doing business in a corporate capacity. A tax which tends to the destruction of its business, or the compelling the corporation by a discriminating tax to give up its corporate franchise, is without doubt such deprivation of property of the corporation without due process of law as is prohibited by the Fifth Amendment of the Constitution.

In speaking of the taxing power Cooley, in his work on Constitutional Limitations (7th Ed. p. 695), says:

> "It will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

In the case of banks, banking institutions and trust companies, whose principal indebtedness is to depositors and generally exceeds their capital stock by several times, it is porvided that all interest paid by such banks, banking associations, or trust companies, on deposits, is to be allowed as a proper deduction. Without receding from our contention that a just tax would allow a deduc-

tion of interest upon the entire indebtedness, it is evident, that, as the law now stands, allowing a bank, banking association or trust company to make such a deduction, and not allowing another corporation, which may be indebted in excess of its capital stock, to make a similar deduction, is marked discriminaton and renders the operation of the law unjust and unequal.

From this brief consideration of the subject, it is apparent that the Corporation Tax Law is not uniform or equal in its operation and will work injustice with respect to the selection of subjects for taxation and also between those selected. It cannot be possible that the effect of the decisions with regard to geographical uniformity is that Congress may pass any tax measure which serves the political expediency of the moment, however unequal or unjust, if that injustice operates in like manner in every State. The recognized principle of equality of burden between direct competitors should be preserved with respect to Federal revenue acts.

It is submitted that if this court shall not determine the tax herein to be invalid as an unapportioned direct tax or as a tax upon the franchise to be a corporation, it must nevertheless be held to be unconstitutional because of the inherent lack of uniformity and equality.

POINT IV.

The Provisions of the Corporation Tax Law with Regard to the Making of Returns and Constituting Such Returns Public Records are Unconstitutional as Requiring an Unreasonable Search.

By the bill in this case it was sought, not alone to enjoin the payment of the taxes sought to be imposed upon the appellee, but also to restrain the appellee

from making the returns to the Collector of Internal Revenue of the net income of the corporation, provided for in the Third Paragraph of the Corporation Tax Law. By the Sixth Paragraph, the returns are to become public records, and in the Fifth and Eighth Paragraphs severe penalties are provided for failure to make return. It is apparent that the constitutionality of these provisions with respect to the return, may be discussed from two standpoints:

(1) The character of the information required to be included in the returns.

(2) The feature of opening the returns to public inspection.

We contend that in both of these respects the Corporation Tax Law is repugnant to the Fourth Amendment, which is:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

A.

The Fourth Amendment Applies to Corporations as Well as Natural Persons.

It is indeed quite patent that a corporation and its stockholders are quite as seriously damaged by any prying investigation into the affairs of the corporation as are private individuals. They do business upon the same footing and suffer as much from a disclosure of their affairs of private concern to their competitors, as do natural persons engaged in the same line of business. The

search of one's papers and affairs is the violation of a distinct property right, an invasion of what Lord CAMDEN referred to in *Entick v. Carrington,* (2 Wils 275) as "often the dearest property a man can have."

The decisions that an officer of a corporation may not refuse to testify because he might by his testimony incriminate the corporation, and which are often loosely referred to as holding that the Fifth Amendment is not applicable to corporations, do not affect the rights of the appepellee here.

In *Hale v. Henkel,* 201 U. S., 43, Mr. Justice BROWN in rendering the decision, made clear the position of the Court (p. 75):

> "Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected under the Fourteenth Amendment, against unlawful discrimination. *Gulf &c. Railroad Company v Ellis,* 165 U. S., 150, 154, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises."

B.

Requiring a Corporation to Make a Return under Penalty for Failure to do so, Constitutes a Search within the Meaning of the Fourth Amendment.

It is unnecessary that there shall be a physical entry and search in order to constitute a violation of the Fourth Amendment. It has been held that compelling a person to produce evidence to which the Government has no right, is equally within this constitutional provision.

Boyd v. United States, 116 U. S., 616.

Hale v. Henkel, (supra).

In the former, a proceeding to forfeit goods alleged to have been fraudulently invoiced to avoid duties, a statute which authorized the Court to make an order directing the defendant to produce the invoices of the goods in question, in the alternative of having the allegations of the information take *pro confesso*, was declared to be unconstitutional. Speaking of the famous case of *Entick v. Carrington*, which upheld the immunity of English subjects from unwarranted search, Mr. Justice BRADLEY, delivering the opinion, said (p. 630):

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense —it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

And, again, after showing the applicability of the Fourth Amendment: (p. 635)

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing

in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it, sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

In *Hale v. Henkel,* a *subpoena duces tecum,* which called for the production of paper and records indiscriminately, upon the authority of the *Boyd Case* was said to be violative of the constitutional provisions.

In the light of these authorities, it is manifest that requiring a corporation under penalty to make a sworn statement disclosing its private affairs, is as much a search of its "house, papers and effects" as would be the invasion of its place of business by a detachment of military. Indeed, that such a report or return comes within the purview of the Fourth Amendment was expressly decided by the Supreme Court of Illinois in *City of Clinton v. Phillips,* 58 Ill. 102:

In that case, an ordinance of the City of Clinton prohibited the sale of intoxicating liquors, but permitted the sale by apothecaries for sacramental, chemical, mechanical or medical purposes, requiring the seller to furnish

to the city clerk within ten days after the expiration of each quarter a written statement, under oath, of all liquors sold during the quarter, mentioning therein the kind and quantity, when and to whom sold, and upon whose prescription or assurance, or pay a penalty of not less than fifty dollars nor more than two hundred dollars. The defendant was indicted for failing to make the return.

The Court dismissed the indictment and held that the return sought to be exacted from the defendant constituted an unreasonable search and that the ordinance was unconstitutional. Mr. Justice THORNTON said: (pp. 104-105)

> "The penalty annexed is not for the sale of spirituous liquors. This is expressly permitted to druggists, for sacramental, chemical, mechanical and medical purposes. It is merely for a failure to report, quarter-yearly, the kind and quantity sold for such purposes, when and to whom sold, and on whose prescription or assurance. This report must be verified by the affidavit of the druggist, and of every clerk and servant in his employ."
>
> * * * * * *
>
> "The section is suspicious in its spirit, and excessively stringent in its requirements. It permits the sale, and then imposes the most odious conditions. A mere venial omission is tortured into a grave offense, punishable with a heavy penalty. The private citizen, invested with no public office or employment, should not be subjected to such inquisition."
>
> "All men have a right to the secure enjoyment of property, and to be protected in their houses, papers, and possessions against unreasonable searches. This section is an invasion of the sanctity of private business, and ought not to be tolerated.

"There was no power to enact it, and the judgment must be affirmed."

C

The Character of the Information Sought to be Elicited by the Returns Required by the Corporation Tax Law is such as to make the Requiring of Such Returns an Unreasonable Search.

Previous internal revenue statutes which have provided for a return by the person subject to the tax as a means to its enforcement, and which are not to be regarded as unconstitutional under the *Pollock* decision, have, in the nature of the case, limited the information called for to the particular goods or operations taxed. The return required by the Statute upheld in *Spreckels Sugar Rfg. Co. v. McClain,* 192 U. S. 397, for example, set forth the amount of gross receipts taxed, that is gross receipts from the sugar business. Indeed where an excise is laid upon a particular business, considerable argument may be made for the proposition that engaging or continuing to engage in that line of business operates as a consent that the government shall have possession of all the information that might aid it in imposing the tax. This idea lay behind the decision of Erskine, D. J. (In re Meador, Fed. Case 9, 375) holding that the act of 1868 which authorized the supervisor of internal revenue to summon any person to produce books and to testify before him was constitutional. The court said p. 1299:

> "As the Meadors, subsequently to the passage of this act of July 20, 1868, applied for and obtained from the government a license or permit to deal in manufactured tobacco, snuff and cigars, I am inclined to be of the opinion that they are, by this their own voluntary act, precluded from assailing the constitutionality of this law, or otherwise controverting it."

No theory of consent to the exposure of its private affairs can be worked out in the case of a corporation chartered by a state, made subject to the tax under discussion. The corporation cannot avoid making the return by giving up a particular line of business. The scope of the information called for covers all of the sources of income a corporation may have. In order to avoid the payment of the tax, or the making of the return it must not only go out of business, but it must be dissolved and lose its corporate capacity.

By this law, the corporation is left no option but to make public all of its affairs of most private concern. The information to be supplied is most comprehensive in scope. Nothing of the corporation's business or affairs is left undisturbed by the government. The answer that the making of the return in the form prescribed is necessary to the imposition of the tax, if true, is not sufficient. It is even more important that the constitutional immunities of the citizen are preserved than that the government should get the revenue provided for.

D

The Provisions that the Returns shall be Public Records open to Inspection as such, Require an Unreasonable Search.

Conceding for the sake of argument that, for the purpose of enforcing the tax, a certain invasion of the corporation's papers and affairs is permissible, still there appears to be no good reason why the returns provided for by the act should be open to inspection by others than those charged with the duty of assessing the tax. No good reason is offered why the Corporation Tax Law should not have provided that, as the practice is with respect to returns required by other internal revenue statutes, the returns should be disclosed only to those who can

satisfy the Commissioner of Internal Revenue that they have a legal right to make the inspection.

Whatever the purpose of the so-called publicity feature, the effect will be to expose to the eye of competitors the most intimate of the corporation's concerns. When it is remembered that this tax is not imposed on private individuals and firms and hence they have not to make returns, it is evident that the appellee will be put to an extreme disadvantage with respect to the natural persons and firms who are its competitors. The publication of such items as total indebtedness, gross income, total expenditures and net income, furnish to the competitor a very definite idea of the margin of success a corporation enjoys. The return shows at a glance the resources of the corporation and the owner of a rival hotel may know just how far the appellee can or will compete with him in expenditures for improvements to attract customers and otherwise. The possession of such information about his rival by one of two competitors places him upon an entirely different footing.

It is respectfully submitted that both from the unrestricted character of the information sought to be elicited and from the provisions for exposure of that information to competitors and others, the Corporation Tax Law provides for an unreasonable search contrary to the Fourth Amendment and hence is invalid.

CONCLUSION.

The Corporation Tax Law, so far as it sought thereby to impose a tax upon the appellee, is invalid. The tax is upon the income of the property of the appellee and hence void because an unapportioned direct tax. If it is not an income tax, it is upon the right or franchise to be a corporation or similar body and do business in a corporate

capacity, which right or franchise being an instrumentality created by the State for governmental purposes, is exempt from taxation. At all events, the tax is unconstitutional because of its confiscatory nature and for want of that equality and uniformity essential in the exercise of the taxing power by a constitutional government, especially in that it taxes corporations and similar bodies only and fails to tax individuals and co-partnerships carrying on like businesses. Moreover the provisions for making of returns and constituting such returns public records require an unreasonable search within the prohibition of the Fourth Amendment.

The decree of the Circuit Court should be reversed and the cause remanded with directions to overrule the demurrer and enter a decree in in favor of the appellant.

Respectfully submitted,

DAVIES, STONE & AUERBACH,
Solicitors for Complainant and Appellant.

JULIEN T. DAVIES,
FREDERIC D. McKENNEY,
Of Counsel.

APPENDIX A

An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

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Corporations, etc., taxable

Sec. 38.—That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies,

Annual Tax 1% on net income over $5,000

Certain corporations, etc., exempt.

orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Net income, how ascertained

Deductions allowed from gross income

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided,* That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business

transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

$5,000 deductions allowed from net income

Tax for calendar year ending December 31st, including 1909

Return to Collector of Internal Revenue to be made by March 1st

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December

thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company, within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company, within the year, stating separately all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States and its Territories, Alaska, and the District of

Form and contents of return

Columbia; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; and in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States or its territories, Alaska, and the District of Columbia, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance companies the sums other than dividends, paid within the year on policies and annuity contracts and the net addition, if any, required by law to be made within the year to reserve fund; (sixth) the amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, interest paid on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States or any State or Territory thereof, and separately the amount so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein; (eighth) the net income of such corporation, joint stock company or association, or insurance company, after making the deductions in this section authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

Collector to transmit return to Comnr of Internal Revenue

Proceedings when return deemed incorrect, or no return made

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company, has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matter required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Books and papers of corporation, etc., may be examined by Revenue Agent

Officers, etc., of corporation may be examined under oath

Commissioner may amend return

Commissioner to assess tax

When return false 100% added

For refusal to make return 50% added

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance com-

pany, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Tax to be assessed and notice thereof given on or before June 1st

Penalty for non-payment by June 30th

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Returns when filed public records

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received,

Misdemeanor for U. S. officer to divulge in unauthorized manner information obtained

evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Penalty for refusal or neglect to make return or for false return

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company, shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

Existing laws as to collection, etc., applicable

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

U. S. Courts may compel attendance of witnesses and production of books and papers

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

When act to take effect

Sec. 42. That unless otherwise herein specially provided, this Act shall take effect on the day following its passage.

Approved. Signed five minutes after Five o'clock, P. M.
August 5th, 1909.



In the Supreme Court of the United States,

ON APPEAL FROM THE CIRCUIT COURT OF UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

CEDAR STREET COMPANY,
Complainant and Appellant,

against

PARK REALTY COMPANY,
Defendant and Appellee.

October Term, 1909.
No. 757.

SUPPLEMENTAL BRIEF FOR APPELLANT.

Statement.

The power of Congress (1) to raise revenue for the support of the General Government, that is, its power of taxation, and (2) the power of Congress to regulate commerce with foreign nations, and among the several states, are both derived from the same article of the Constitution of the United States. In their origin, they are equal and co-ordinate powers. The power to regulate commerce is, however, exclusive of, the power to tax concurrent with, the powers of the several states.

It is a fundamental maxim of Constitutional law that all the component parts of an instrument must be so construed as to make an harmonious and indivisible whole. This rule of construction would require the application of very broad rules in determining the question of a possible conflict between any one or more of the express powers set out in the Constitution, and must be borne in mind in the following discussion.

If, however, it can be clearly shown that Congress in the attempted exercise of one of its powers has clearly exceeded its proper limitations and infringed upon or violated some inherent right from which sprang another of its powers, it is certain that such exercise would be unconstitutional.

All rights and powers not specifically granted to the federal government by the Constitution have been expressly reserved to the people and to the States by the Ninth and Tenth Amendments thereof.

One of the greatest objects of the Constitution was to foster and promote commerce between the states and for that reason the exclusive power to *regulate* the same was given to the United States.

It could not have been intended in giving the power to *regulate*, to give the power to prohibit or destroy.

Interstate commerce, or speaking broadly in the words of Chief Justice Marshall, the right of intercourse between the states by their respective citizens, is a right which neither the states nor the Federal Government could deny to the individual.

To pursue the ordinary activities of life, to buy, to sell, to carry on various trades and callings, subject to reasonable regulations is to do no more than live—and when the States relinquished their right to *regulate* interstate com-

merce and transferred it exclusively to Congress no power of prohibition was impliedly or expressly given.

The power of taxation bestowed on the general government must be exercised subject to the limitations prescribed in the Constitution. The right of the citizen to engage in interstate commerce must be exercised subject to the power of Congress to *regulate* the same. If Congress in the attempted exercise of its power to tax shall have exceeded its legitimate power and attempted to impose a tax upon a constitutional right, it then becomes clear beyond the need of argument that Congress has exceeded its power of taxation, for the power to tax is the power to destroy. If Congress creates a privilege out of a right and requires the payment of a bonus or tax, before such right can be exercised, then it can by increasing the burden of taxation destroy, to all practical intents and purposes, the existence of the right, for if the right to impose a tax *at all*, exists on the part of a legislative body, it is a right which, in its nature, acknowledges no limits (see *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 763), and it may be exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. (*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.)

In order to apply the above reasoning to the particular facts at issue, several things must be determined:

First. That the right of all persons as well as corporations, to engage in interstate commerce is a constitutional right and one which cannot be *taken away* or *prohibited*, although it can be *regulated* by Congress.

Second. It must be shown that taxation exceeds *regulation;* in other words, that the power to regulate does not

include the power to tax, which is equivalent to the power to destroy or prohibit.

If the above two propositions be true, the new Corporation Tax must be unconstitutional for, as to corporations engaged in such business, it is clearly a tax on the doing of the business of interstate commerce.

I.

To engage in interstate commerce is a Constitutional right and not a privilege, therefore Congress cannot prohibit the exercise of such right.

The law to support the above proposition cannot be found in any case directly in point. In fact, there are some dicta to the contrary and numerous specific instances of particular commodities or articles which have been excluded from interstate commerce, but all of such cases, it is believed, should properly be referred to the exercise of a Federal police power. Chief Justice Marshall said, in *Gibbons vs. Ogden*, 9 Wheat. page 1, in speaking of the power to regulate commerce, that "Like all others vested in Congress, it is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution", and Mr. Justice Swayne said that in exercising this power Congress had "all the powers which existed in the States before the adoption of the National Constitution and which have always existed in the Parliament in England." (*Gilman vs. Philadelphia*, 3 Wallace 713.)

The Wilson Act and the Sherman Anti-trust Act are examples of Federal legislation which are, in their effect, prohibitive. The excise taxes on tobacco, whiskey and oleomargarine (*McCray vs. U. S.*, 195 U. S. 27, 49 L. Ed. 78), have all been sustained as proper exercises of the power of Congress to tax, even though such taxation would result in the prohibition of the manufacture of the specific article taxed, and its withdrawal from the channels of interstate commerce. The imposition of an excise tax on a single article, however, is very different from the imposition of an excise tax on the "doing of interstate commerce business" by a corporation. In the lottery case, 188 U. S. 321, it was held that Congress had plenary authority over interstate commerce and might prohibit the carriage of lottery tickets from one State to another. In that case, however, the Court declared "this power may not be exercised so as to enfringe rights secured or protected by" the Constitution.

As is well stated by Mr. Calvert in his book on Regulation of Commerce "it may well be doubted whether Congress has the absolute and unlimited power to prohibit the transportation, from one State to another, of articles respecting the use of which no question of public health, public morals, public safety, or public convenience can arise."

As supporting this view there are numerous decisions in which the engaging in interstate commerce is spoken of as a constitutional right, and, of course, if it is a constitutional right, it cannot be prohibited by any Act of Congress. In the case of *Crutcher vs. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, the Court was discussing the validity of a statute of Kentucky regulating the agencies of foreign express companies. In its discussion the Court said "to

carry on interstate commerce is not a franchise or a privilege granted by the State. It is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the acquisition of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

Just what the Court meant by saying "unless Congress should see fit to interpose some contrary regulation on the subject" is somewhat doubtful. It might be construed to mean that Congress might prohibit the carrying on of interstate commerce by corporations, while it could not prohibit the carrying on of such commerce by individuals, but such an interpretation would not be reasonable. At any rate no such regulation has been passed and it seems to be settled at present that individuals and corporations are on the same footing in this respect.

In *Reid vs. Colorado*, 187 U. S. 137, 47 L. Ed. 115, in discussing the validity of quarantine regulations of the State of Colorado, the Court said (p. 151):

> "Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one State to another State. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a State, against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the State will or may be injurious to its domestic animals."

In *Howard vs. Illinois Central Railroad Company*, 207 U. S. 463, Justice White, in a very able opinion, disposes of an argument made on behalf of the government in the following words:

> "It remains only to consider the contention which we have previously quoted, that the Act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the *right* to engage in interstate commerce as *a privilege* which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress."

In *Western Union Tel. Co. vs. Kansas*, 216 U. S. 1, decided January 17th, 1910, 53 L. Ed. 202, the Court spoke through Justice Harlan, as follows:

> "We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct any local business. It is of the last importance that the freedom of interstate commerce shall not be tram-

meled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system, and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land."

Further on, in summing up the case, the Court said:

"The right of the telegraph company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The Company was not bound, under any circumstances, to surrender its constitutional exemption from State taxation, direct or indirect, *in respect of its interstate business* and its property outside of the State, any more than it would have been bound to surrender *any other right* secured by the national Constitution."

See also in this connection the concurring opinion of Justice White in Pullman Company vs. Kansas, 216 U. S. 56, where Justice White discusses the imposition of burdens upon corporations doing an interstate business, in the shape of taxation under State laws.

Justice White says:

". . . if a State in express terms enacted that all foreign corporations which availed of the *right* granted them by the Constitution of the United States to carry on interstate commerce within the State without the previous consent of the State, as a penalty for not obtaining that consent, be deprived of all right to transact local business, it would not, I

> assume, be contended that such an enactment was not a discrimination against the corporations to which it applied because of their possession of a *right* conferred upon them by the Constitution of the United States. And yet such must be the direct and immediate result of applying an absolute act of exclusion to corporations who are not subject to such absolute exercise of power, because of the *right* bestowed upon them by the Constitution of the United States to carry on within a State an interstate commerce business." (Italics added.)

It will be noticed that Justice White speaks throughout his entire opinion of the *constitutional right* of a corporation to engage in interstate commerce.

That this right to engage in interstate commerce applies as well to corporations as to individuals was held in several cases, among them *Paul vs. Va.*, 8 Wallace, 168, 19 L. Ed. 357:

> "This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations."

The above expressions of the Supreme Court of the United States, taken at random from numerous decisions, would seem to establish the first of the propositions laid down in the beginning of this memorandum, namely, that the Constitution of the United States grants to individuals and to corporations the right to engage in interstate commerce subject only to the *regulation* of Congress.

By the power of regulation, Congress is not given the power to prohibit.

It may be argued against the theory above presented, that the power to regulate commerce between the States is as broad as the power to regulate commerce with foreign nations and with Indian tribes, and that it had been held that Congress has the power to prohibit foreign commerce, as well as commerce with the Indian tribes, but a careful examination of the decisions involving this point will show in each case clear intimations of a distinction between the power to regulate commerce between the States and the power to regulate commerce with foreign nations and with Indian tribes.

I. C. C. v. Brimson, 154 U. S. 447.
Buttfield v. Stranahan, 192 U. S. 470.
United States v. Williams, 194 U. S. 279.
U. S. v. JuToy, 198 U. S. 253.
Oceanic Nav. Co. v. Stranahan, 214 U. S. 320.

II.

Taxation is not included within the power of regulation granted by the Constitution.

It must be conceded that the power to tax is the power to destroy or prohibit. In other words, if interstate commerce can be taxed at all, it can be taxed out of existence and thus prohibited (*McCray v. U. S.*, 195 U. S. 27).

The sole question is whether the *power to regulate* includes the *power to prohibit or destroy.*

The courts have said many times that the power to regulate does not include the power to prohibit:

Miller v. Jones, 80 Ala. 89.
Bronson v. Oberlin (O.), 52 Am. Rep. 90.
Ex Parte Patterson (Tex.), 51 L. R. A. 654.
Duckall v. New Albany, 25 Ind. 283.
McConvill v. Jersey City, 39 N. J. Law 38.
People v. Codway, 28 N. W. 101.
Mernaugh v. Orlando, 41 Fla. 433.
In re Hanck (Mich.), 38 N. W. 275.
State v. DeBar, 58 Mo. 395.
Sweet v. Wabash, 41 Ind. 7.
Andrews v. State (Tenn.), 8 Am. Rep. 8.
Ex Parte Byrd (Ala.), 4 Sou. 397.

An authority directely in point is *Muhlenbrinck v. Long Branch Comrs.* (N. J.), 42 N. J. Law 364, where it is held that the word "regulate" as used in a corporate charter authorizing a city to regulate and license a business or trade, confers no power to impose a *tax* upon such business or trade.

The weight of authority would, therefore, seem to be that taxation exceeds regulation, therefore, power to regulate is not power to tax, or to destroy.

Conclusion.

If it can be considered as established that the doing of interstate commerce business subject to reasonable regulations is a right to which every person is entitled under the Constitution of the United States, then the exercise of such right cannot be prohibited by Congress.

To tax such a right would be an admission of the power to destroy or prohibit such right, therefore, no tax would be levied by Congress *upon the right to engage in interstate commerce.*

In the opinion of Senator Flint, who had charge of the Corporation Tax Law on the floor of the Senate, a corporation included within the terms of the Act would be taxed not for doing business "as a corporation", but simply for the "privilege of doing business", for which privilege the individual would not be taxed under the law.

The Corporation Tax Law now applies to all corporations (save those specifically excepted), doing intrastate or interstate business.

In the case of a corporation doing only an interstate business, the tax would necessarily be upon the privilege of doing interstate business. If the tax is invalid as to this class of corporations, the whole law must be declared invalid.

If Congress cannot tax the business of interstate commerce or interstate commerce itself, it is hard to conceive how it can tax the privilege of doing such business.

In the case of *Western Union Telegraph Company v. Kansas*, 216 U. S. 1, decided January 19th, 1910, the Court, citing from *Leloup v. Mobile*, 127 U. S. 640, says (p. 645):

> "Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a

> State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

The above language fits this argument absolutely. Can Congress forbid the carrying on of interstate commerce by a corporation unless it will pay a tax and procure a license for the privilege? If it can, it can prohibit the transaction of such business altogether. We fail to see how Congress can tax the business of interstate commerce when it cannot tax interstate commerce itself. The exaction of a license tax (assuming that the tax now under consideration is an excise tax, and, therefore, a license tax) as a condition of doing interstate commerce business, is a tax on interstate commerce, and surely exceeds the power of Congress.

For a privilege to be the subject of taxation, it must exist before it can be taxed, that is, its existence must necessarily precede the tax, and it is not within the legitimate power of Congress to create a privilege of first prohibiting the enjoyment of the right to engage in interstate commerce, a right common to every person in the United States, and then suffer such only as will pay a specific sum of money to the United States, as a tax, the liberty of enjoying such right.

The fundamental idea of a tax is far from a regulation. The courts have defined what taxes are in numerous instances, but there does not appear to have been any case in which a tax has been held to be properly within the scope of a regulation, except, possibly, in connection with the enforcement of some police regulation. The object of

the corporation tax, as expressed in the title of the Act, Approved August 5th, 1909, is "To raise revenue, equalize duties and encourage industries." By what possible process of reasoning can such an object be construed as a legitimate regulation of commerce? And yet so far as corporations doing only an interstate business are concerned, the tax can only be sustained as a regulation of commerce, for it seems to be clear that Congress cannot under its power to tax, tax interstate commerce, or the business of carrying on interstate commerce, the same being a right guaranteed under the Constitution of the United States.

Respectfully submitted,

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Of Counsel.

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MAR 23 1910

JAMES H. McKENN

U. S. Supreme Court.

CEDAR STREET COMPANY,

Appellant,

against

PARK REALTY COMPANY,

Appellee.

ARGUMENT FOR APPELLANT IN REPLY.

JULIEN T. DAVIES,

Of Counsel for Appellant.

New York:
Stillman Appellate Printing Co.
1910.

United States Supreme Court.

CEDAR STREET COMPANY,
Appellant,

against

PARK REALTY COMPANY,
Appellee.

No. 757.

Argument in Reply for Appellant.

The main question involved in this case is whether Section 38 of the Tariff Act of 1909 is violative of provisions of the Constitution of the United States.

First. Is this statute violative of those provisions which require a direct tax to be apportioned among the States according to population?

Second. Is the statute violative of the implied provisions of the Constitution that the United States Government shall not tax a governmental instrumentality of the States?

Third. Is the statute violative of the Fifth Amendment of the Constitution, in that it takes property without due process of law, because it is confiscatory in its nature and not a proper exercise of the taxing power, in that it taxes only corporations and similar bodies, and does not tax

co-partnerships and individuals engaged in like businesses, thus violating the fundamental tenet that taxation shall involve *equality of burden upon direct competitors?*

Fourth. Is the statute violative of the Fourth Amendment to the Constitution, in that it provides for unreasonable searches and seizures of the papers and effects of corporations?

These are the propositions to be examined:

First.

1. We assert that the tax in question is a direct tax levied upon the real and personal property of corporations through taxation of their incomes, notwithstanding that the tax falls upon the commingled incomes derived from investments by corporations of capital in real and personal property, and from profits created by labor and skill. We contend that the inclusion in the total net income of corporations of income derived from investments in real and personal property and the inclusion in the class of corporations taxed of those who do not carry on or do business leads to the result that the law as a whole must fall.

The law is drawn upon the theory that every corporation or similar body that has a net income of over five thousand dollars is presumed to be carrying on or doing business. The aspect of the law is that merely investing money, accompanied by abstention from doing or carrying on any of the business for which the corporation was organized, creates liability to pay the tax. The tax is not levied upon the business or upon the acts of the corporation in carrying on or doing business. The language of the statute is "with respect to the carrying on or doing business." These words might be omitted from the statute and its operation and effect would be precisely the same as if they were retained. The incidence, the burden, the subject

of the tax are determined by a consideration of the indispensable elements for its ascertainment. The carrying on or doing business is not one of these elements. Only two things are essential under this statute for the purpose of assessing and collecting the tax. One is that there shall be a corporation, the other is that it shall have a net income of above five thousand dollars. The case of this appellee illustrates this position. It is doing no business. All its property and assets are represented by the Hotel Leonori held by a lessee under a long lease. The appellee does not collect the rents from the occupiers of the property, and does nothing but receive from its lessee his semi-annual payments. It is an investor, pure and simple. This tax, as to the appellee, is not a tax on business, but is a tax on income.

The words in the statute "with respect to the carrying on or doing business by such corporation" are of no service in defining the subject of the tax. They are too vague, uncertain and indefinite, as indicating the subject of the tax. So far as they have any relation to that matter, they simply indicate that every corporation that has a net income is to be considered as carrying on or doing business, including corporations that are investors pure and simple and do no business of any character or description different from that performed by an individual who collects the rents of real estate or cuts coupons from bonds. The only function that these words really perform in the statute is to be taken in connection with the words "special excise tax" as qualifying them. It follows that the statute intends to designate the tax as a special excise tax with respect to the carrying on or doing business by a corporation. That is the kind of special excise tax that is here attempted to be laid, but as the net income considered includes net income from other sources than business, to wit, from property, the attempt fails and we have an income tax. There is no doubt about the intention and purport of

the statute, but these words do not add anything to the its strength, and if omitted, the statute would operate in precisely the same way and the tax be ascertained in the same way. Suppose the statute read: "Every corporation, etc., is made subject to pay annually a tax equivalent to one per centum upon the entire net income, etc." There would be no question then but that we would have an income tax, a direct tax unapportioned and therefore invalid under the ruling of this Court in the *Pollock* cases. Clearly, Congress cannot make that an excise tax by calling it such which, but for its designation as such, would not be an excise tax. The language used is equivalent to a statement that this is a special excise tax upon corporations with respect to their holding property as an investment and collecting the income thereof, equivalent to one per centum upon their net income, and if such a statement were made in the statute one would clearly have an income tax.

The vice of the statute is that it reaches and taxes and imposes a burden upon the real and personal property of corporations who are not carrying on or doing the business for which they are organized and who are merely investors, in precisely the same manner as private individuals, of accumulations of money; and that it includes in the net income of corporations, who are carrying on the business for which they are organized and incorporated, the net income from investments in real or personal property which are not used in their business and do not contribute to the profits of the business. Assuming for the purpose of argument that Congress could, by a general and sweeping dragnet of a statute, tax all corporations upon their occupations or businesses, measured by the net profits or net income of their occupations or businesses, the vital question here is, whether, in view of the fact that Congress has gone further than this and has included in the net incomes of corporations the profits of investments—the profits of the use of

real and personal property not employed in business, held and owned by the corporations purely by incidental and subordinate powers and by precisely the same tenure and under the same body of laws that real and personal property are held by individual citizens—this commingling and inseparably combining the incomes derived from business and from investment do not make the statute an income tax law and therefore invalid as a whole. We have here precisely the question that was presented in the *Pollock* cases, where the net income of corporations from investments and from business were commingled. While the Court in those cases delined to discuss, and apparently conceded, that Congress, by the exercise of the power of imposing excise taxes, might tax the profits of occupations or businesses, the law was held invalid as a whole because its necessary effect, as is the necessary effect of this statute, was to tax the income of the invested real and personal property of the corporations, and thus to tax the properties themselves, and therefore to impose a direct tax without apportionment.

In the *Spreckels* case, so much relied upon, the tax was levied upon a specific kind of business, to wit, that of refining sugar, and the Court held the necessary effect was to exclude from the operation of the law such real estate as was not employed in that business. In that case, the tax was not laid upon the net income of the refiners *from all sources,* but only upon the receipts from the businesses taxed. Does the Government concede with respect to this tax that, in making up the returns of net income, the corporations are to be permitted to exclude the net income from such real and personal property as are not employed in carrying on the business for which the corporation was organized? Clearly, no such concession can be made in view of the language of the Act, because the Act does not permit separation of income from the property and the income from business. Does the Government concede that from

the net income of the corporations taxed may be excluded the income from municipal bonds, which this Court has held are not the subject of taxation by the United States Government, or the income from United States bonds, which by solemn act of Congress have been declared to be free from all taxation? Clearly not, there is no warrant in the statute for any such exclusions. The Government is necessarily driven to adhere to the position that the net income to be taxed includes the net income from invested property, real and personal, which is not employed in the business of the corporation, and that the statute reaches every corporation which has a net income, notwithstanding it may not be carrying on or doing business which can be said to be a vocation or an occupation or in any sense the proper subject of an excise tax. The learned Solicitor-General necessarily plants himself upon the untenable position that even property not used in the business of a corporation is a "business asset", and that its income is properly a part of the measure of the value of the business.

The language of the statute is that the tax is to be "equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon the stock of other corporations." In view of this language, it was impossible that the Attorney-General could rule otherwise than as he has advised, that included in this net income must be income derived from investments from municipal bonds and bonds of the United States. It is clear that, to comply with the Act, there must be so included all income from all investments by corporations in real or personal property, although such property be not employed in the business of the corporation.

It follows that the Act necessarily imposes in part an income tax, that such part is inseparable, and that the whole statute must fail.

2. The Government naturally, in view of the decisions of this Court, makes no attempt to sustain this statute as an income tax. The strength of its argument is devoted to the proposition that this tax is laid upon corporations who do any acts which result in producing a net income of over five thousand dollars, and that such acts are carrying on or doing business within the words of the statute and are necessarily the proper subject of an excise tax.

If this be an excise tax, it must rest generally upon all the acts and all the transactions of corporations and similar bodies from which result net income. The tax is not laid upon special or enumerated businesses. It is not laid upon the business for which the corporation is organized. It is laid generally upon all its acts and all its transactions, taken as a whole, resulting in the creation of the residuum of net income from all sources. The act would mean the same in the view of the Government as if it read: "a special excise tax upon all the acts and transactions of every nature of such corporation equivalent to one per centum upon its entire net income over five thousand dollars received by it from all sources during such year." But clearly, if any such tax as this were laid upon an individual, it would be simply an income tax and nothing more. The income tax passed upon in the *Pollock* cases, *which dealt with assessments on corporations* under the statute of 1894, was upon income received from all sources. When the statute lays the tax with respect to the carrying on or doing business upon all the acts and transactions of any individual or corporation equivalent to one percentum of net income from all sources, it must be that we have nothing but an income tax, because the words "with respect to the business" of the corporation, or the individual, add nothing whatever to the idea expressed, and do not change the result effected through making the tax equivalent to one per centum of the net income received from all sources. If the tax be measured by the net income from all sources, it necessarily

takes into contemplation all the acts and all the transactions of the individual or corporation taxed.

The learned Solicitor-General makes the point that legally and practically all the property of a corporation is engaged in the business of the corporation. Legally, because the corporation is not authorized to acquire and hold property except for the purpose of its business, practically, because the accumulations strengthen the credit of the corporation, enable it to borrow money more cheaply and thus enhance the business.

The first contention amounts to this, that if the property is not being employed in the principal business of the corporation, it is *ultra vires* for the corporation to hold and manage it. But the property or accumulations under discussion are not property and accumulations held illegally, but under the authorization of incidental and subordinate powers expressly conferred in the corporate charter. A mining corporation, which, having exhausted the mineral wealth of certain lands, leases them for agricultural purposes, and turns over the rental to its stockholders, as was the case in *Coal & Mining Company v. Ladd*, 160 Mo. 435, is doing nothing illegal or *ultra vires* and yet is certainly not employing those lands in the business of mining.

As to the contention that, practically, all the property of a corporation must be devoted to its principal business, because accumulations of wealth improve the credit of a corporation, that observation is just as applicable to individuals, because reputation for possession of investments and wealth equally enlarge the credit of an individual.

Despite these contentions of the government, the *Pollock* cases are applicable. It is worth noting that the particular section (Sec. 32) of the Act of 1894, passed upon in the *Pollock* case, had no reference to a tax upon the income of individuals, but related solely to an income tax upon enumerated and "all other corporations, companies or associations doing business for profit in the United States,

no matter how created and organized, but not including partnerships". With the exception that there was there no explanation that the tax was "with respect to the carrying on or doing business" by such corporations, that section was substantially the same as the one now under consideration. It is inaccurate to say that the *Pollock* case governs this case. This *is* the *Pollock* case in a new form.

An individual carrying on a business and taxed as upon the income of his business would not be taxed on the income from his investments. If such an individual were taxed on his net income from all sources he would pay on the income from his investments and therefore pay an income tax. Investing money and collecting income is no more carrying on business when done by a corporation than it is when done by an individual.

Even in the event that the Court should hold that the Federal Government had a right to tax corporations as such and simply because they were corporations and to classify them as a subject of taxation, differentiating them from individuals and co-partnerships, nevertheless, the law would be invalid. This follows from the circumstance that the measure of the tax is the total net income of the corporation. That income necessarily consists of two parts; first, the result of the business carried on by the corporation; and, second, the return from its investments and the earnings of its properties, real and personal, not used in its business. While the net income derived from the operations of the business for which the corporation was organized might be a proper measure of the value of the right to be a corporation or the value of corporate capacity, or the business itself, the income from investments from real and personal property not used in business and held and managed precisely as a private individual would hold and manage property is in no respect a measure of anything but the value of the property itself. This statute not only imposes a tax upon the profits of the business of the corporation, but also upon the income of its property,

real and personal, and we have commingled with an indirect tax, a direct tax upon the property of the corporation, unapportioned and therefore invalid.

Here is seen the sophistry of one of the arguments of the learned Solicitor-General. He contends, and we deny, that the net income of a corporation from all sources is a just and fair measure of the value of a business or an avocation; and he contends, and we admit, that the entire net income of a corporation engaged in business is not a fair measure of the value of its real and personal property. And to illustrate these propositions he first takes the case of a corporation whose earnings are largely due to labor and very little to property, and then the case of a corporation whose earnings are largely due to property and very little to labor. We can safely admit that in any case where the profits of a corporation are due to labor and to property used in the business, no matter what the proportions may be in which labor and property contribute to the result, the net income is a fair measure of the value of the business or of the right to do business or the corporate capacity. The learned Solicitor-General evades the point of our argument, however; which is that the net income provided for in this statute is not limited to the net income derived from mingled labor and property used in the business, but includes net income derived from investments of real and personal property not used in the corporation's business; and that to the extent that such income from such invested property is included in the net income of the corporation we have a tax upon property joined to an attempted tax upon a corporate franchise or business; and that because such tax on property is a direct tax unapportioned, because it is levied upon municipal bonds and United States bonds, which cannot be the subject of taxation, and because there is no method of construing the statute by which there can be omitted from the net income of corporations so much thereof as represents earnings of exempt property or of property not used in business, and

because it cannot be supposed that Congress would have passed the statute at all if the tax had to be cut down by leaving out so much of net income as is derived from property, either exempt or not used in business, the law must be declared invalid.

Second.

It is evident that the inclusion in this statute of individual persons and co-partnerships as taxpayers would result in the tax becoming an income tax and nothing more, because it taxes net income from all sources. We are therefore driven to the conclusion that the limitation or classification of the class of taxpayers to corporations makes the existence of corporate capacity the indispensable element and the test of paying the tax. Nobody but a corporation or a similar body pays this tax. One of the controlling elements of taxability is being a corporation. The other is having a net income. If the tax is not an income tax levied on income, it is, if it be an excise tax, a tax upon corporate capacity or the right or fact of being a corporation. If it be a tax upon corporate capacity or the right or fact of being a corporation, then it must be invalid, for the reason that corporate capacity is conferred by a sovereign State and the right to be a corporation is a franchise possessing an attribute and somewhat of the power of a sovereign State. A corporation, viewed from the standpoint of its right to exist and to have corporate capacity, is a State and governmental instrumentality, and not the subject of taxation as such by the United States, apart from the taxation of its property or of its businesses in connection with the proper exercise of the taxing power within the limitations, expressed or implied, of the Constitution.

The right to be a corporation is not the subject of taxation by the United States Government. Corporate capacity is conferred by the sovereign. A corporation partakes

of the attributes of the sovereign creating it and is an exercise and the creature of sovereign power. The different States, from motives of public policy, have determined that certain businesses, such as the banking business, the insurance business, the railroad business, and in some States the water, gas, electric lighting and street transportation business, shall be carried on by corporations only, many of whom receive from the State the power of eminent domain, the right to take private property upon making compensation therefor, which taking is only justified on the ground that it is for a public use and that the corporation exercising the power of eminent domain is exercising a right of a sovereign State derived from the government creating it. It is certainly clear that public service corporations with the power of eminent domain are government instrumentalities, endowed with and exercising governmental powers, performing duties and functions which not only are often performed by the State itself but which are within the ordinary duties of the State in making provision for the health and prosperity of its citizens. It is of no consequence whether the State performs these duties directly or through the medium of its agents and instrumentalities, the corporations carrying on its governmental functions.

But it is equally for motives of public policy connected with the health and prosperity and well-being of their peoples that States provide for the transaction of many of the ordinary avocations and businesses that may be equally as well carried on by individuals, by means of the creation of corporations. The incorporation of real estate companies with power to buy and sell real estate, to improve and lease it, such as is this defendant, the Park Realty Company, leads to the utilization of valuable pieces of land by extensive improvements beyond the means of any single individual, save in exceptional cases. Such parcels of real estate, evidently, are more apt to be improved by large expenditure if a number of individuals are enabled

to join together through the medium of a corporation, than if the task were undertaken by a single individual with his private fortune. Furthermore, such corporations, affording evidence of ownership in the property by means of shares of stock, bring about the ready division and disposition of real property and tend to avoid the tying up of the title to real estate and the suspension of the power of alienation. These are the results advantageous to the community and brought about by the act of the sovereign State through its creature, the corporation.

Irrigation companies, mercantile and trading companies, steamship companies—the list may be almost indefinitely prolonged from the various activities in human affairs—are corporations which the States, by a wise system of corporate laws, encourage to enter into competition with individuals. Certainly, these various statutes are not passed from love of corporations but from motives of public policy and as aids in the government of the people and the regulation of their affairs.

With respect to our contention that the Corporation Tax, if not upon income, is, nevertheless, invalid, because violative of the implied limitation in the Constitution of the United States that Congress may not tax or otherwise impede the instrumentalities of a State, the learned Solicitor-General makes three propositions: First, that the tax is not upon the right to be a corporation, but upon the user of that right; secondly, that the franchise to be a corporation is not in reality conferred by the State, but is conferred upon the incorporators by themselves and is hence a proper subject for taxation; and, thirdly, that for the reason that the United States is supreme and the State subordinate, a Federal Tax Law must countervail, even though it interfere with the legislative independence of the States in their own sphere.

As to the first proposition. It is axiomatic that taxation involves the impairment or curtailment by the Sovereign, whether constitutionally or otherwise, of some

recognized right existing in the subject. The distinction between the right to be a corporation or similar body and the right to use the right to be a corporation or similar body is not clear. But if, as contended in the argument of the learned Solicitor-General, the user of the right to be a corporation, defined by him as the subject of the tax, is nothing more nor less than the business of the corporation; then, the tax cannot be upon such user of the franchise, because it does not fall upon the business, for the tax is not confined to the income from business, but is measured by the income of the corporation *from all sources.* No *analogy* which can be drawn from the facts in *Knowlton v. Moore* can serve to sustain the tax. There is a distinction between such legislation as is merely *permissive* or at most *regulative* in its character, such as that relating to inheritances and devolution of property by death, and that which is *creative,* such as that relating to the authorization of corporate existence. After property has devolved by death, subject to laws of the State governing such devolution, the same property is there, and there is nothing new, except that it has changed hands in accordance with law; but when men incorporate, by virtue of the creative force of the law there is brought into existence and placed in the hands of the incorporators something which they did not have before, to wit, the franchise of corporate capacity; there is, according to Blackstone, the "branch of the king's prerogative subsisting in the hands of a subject."

As to the second proposition. The contention that the franchise or right to be a corporation is self conferred, is conspicuously unfortified by authority. It is opposed to the uniform doctrine and thought of this court.

> "The creation of a corporation it is said, appertains to sovereignty. This is admitted." (Chief Justice Marshall in *McCulloch v. Maryland*).

> "No persons can make themselves a body corporate and politic without legislative authority." (Mr. Justice Bradley in *California v. So. Pac. R. R. Co.*, 127 U. S. 1 at p. 41).
>
> "Upon the other hand, the corporation is a creature of the State. * * * * * Its rights to act as a corporation are only preserved to it so long as it obeys the law of its creation." (Mr. Justice Brown in *Hale v. Henkel*, 201 U. S. 43 at p. 74).

The argument of the Solicitor-General is placed solely upon the consideration that, inasmuch as there is no compulsion upon persons to become incorporated, private persons may prevent the organization of a corporation and he asks (page 81 of brief): "May not the United States burden, if even private persons may wholly prevent, the actual existence of corporations or their franchises?"

It is almost too obvious to suggest that the power to prevent or destroy is not the power to create. Human life is the best example.

Nor does it follow, from the fact that because of the large number of applications for corporate capacity and the readiness with which many such applications may be classified, incorporation is now, in most States, under general laws, that the only part which the State has in the transaction is the regulation of the conditions under which persons may be incorporated and confer upon themselves corporate capacity. The principle involved is no different than in the creation of a corporation by patent of the Crown or by special legislative act. The State may provide the opportunity or facility to incorporate, but in each act of incorporation there is a grant of sovereign power.

As to the third proposition. The Solicitor-General finds no objection to the tax in the fact that it "will interfere with the legislative independence of the States in their own sphere (Brief for U. S., p. 82). This is based upon consideration (page 87) of the fact that a State insolvency law must give place to the bankruptcy law, and that a State law affecting interstate commerce must give way

to Congressional legislation on the subject, both instances of State legislation decidedly not within the State's own sphere but within the sphere of the express powers conferred upon the Federal Government. State banks in company with all other property interests are subject to a proper and just excise by the Federal Government, but there is nothing in *McCulloch v. Maryland* to sustain the proposition that the United States may tax the instrumentalities of the State, and indeed none of the subsequent decisions of this Court have so interpreted *McCulloch v. Maryland,* but, upon the very ground of the decision in that case, have held that within the sphere of the powers reserved to the States by the Tenth Amendment, they were not subject to be burdened or hampered by Federal taxation. This principle is based upon the necessity of the preservation of the dual character of our Government, recognized in the Constitution. Of the proposition contended for on page 87 of the Government's Brief, to wit, "the supremacy of each power of the national government over all powers of a state, whenever the two meet, and the correlative subordination of all state powers to each national power," the Court said, in Collector v. Day, 11 Wall, 113, at page 126:

> "The supremacy of the general government therefore, so much relied upon in the argument of the counsel for the plaintiff in error in respect to the question before us cannot be maintained. The two governments are upon an equality."

The case of *South Carolina v. The United States,* 199 U. S. 437, has no adverse bearing upon this branch of the argument. In that case, this Court held that a license tax by the Government of the United States upon sellers of spirits was properly imposed upon individuals who were acting for the State of South Carolina, which had monopolized that business within its borders. The Court put its decision upon the ground that, although the State in the exercise of its police powers had properly undertaken this

business, yet that it was a private business and that the agents of the State were pursuing an avocation which had been a proper subject of taxation by the United States Government before the formation of the United States and the adoption of its Constitution, and that the business and avocation of selling spirits, although carried on by an agent of the State, was therefore a proper subject of taxation by the United States. The Court did not hold that it was within the power of Congress to treat the conducting of the business by the State as an element in the liability to taxation, but merely held that Congress was not bound to make the conducting of the business by the State a basis for exemption from taxation. That case is no authority for the proposition that the United States Government can tax every corporation or similar body simply because it is a corporation, and by reason of the fact that it is a corporation, and thus impose a tax on the corporate capacity or right to be a corporation conferred by the State. No claim is here made that the business of any corporation is not the proper subject of taxation by the United States Government or that the income from any business of any corporation cannot be so taxed, provided due process of law is employed and there be *equality of burden among direct competitors.* The license tax upon the seller of spirits in South Carolina was a tax upon the business of selling spirits. Similar reasoning would allow Congress to tax the business of corporations by general laws applicable to such business and not basing the liability to taxation upon the corporate capacity in which the business was done. We do not deny the power of a government so to tax such business, together with that of individuals, according to due process of law. It will be noticed that in the *South Carolina* case there was no discrimination and no limitation of taxation upon the agents of the State, but all dealers in spirituous liquors were alike obliged to pay a license tax; and similarly we contend here, that all individuals and co-partnerships must

pay for the privilege of carrying on business if corporations are taxed upon similar businesses, in order that there should be a valid tax imposed in observance of due process of law and that the tax should avoid being laid upon either incomes or corporate capacity.

In the case of *Murray v. Wilson Distilling Company*, 213 U. S., 151, page 173, Mr. Justice WHITE said with reference to the South Carolina Dispensary case:

> "That case was concerned with the power of a State, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a pre-existing right of taxation possessed by the Government of the United States."

In no sense did the Court in either of these cases decide the general proposition that the United States could tax the right or franchise of being a corporation or of doing business in a corporate capacity.

There seems to be little room for argument against the proposition that the taxing power of the United States must fall short of reaching public service corporations possessing the power of eminent domain, and that they must be considered beyond question as governmental instrumentalities. If this be so, the statute as a whole must fall, because it cannot be considered that the Congress would have passed this statute if the enormous percentage of the possible results of the law attributable to net income of public service corporations must be subtracted from its yield.

We do not contend that the Congress cannot tax avocations or businesses within the limitation of equality of burden upon direct competitors. Our contention is that if the tax is to be considered as laid upon the right to be a corporation or the privilege of doing business in a corporate capacity or upon corporations as such, it must fall by reason of the burden imposed upon governmental instrumentalities.

Third.

The proposition of the Government is that the tax is on the business transacted by corporations, and that such business is a proper subject to be placed in a class by itself distinct and separate from similar businesses carried on by individuals, by reason of the privileges that corporations enjoy in consequence of a special system of laws that are applicable to them and not to individuals. This argument recognizes the principle for which we contend, that there is an implied limitation upon the powers of taxation by Congress to the effect that there must be reasonable and not arbitrary classification of subjects, in obedience to the great law that taxation must be so laid as to produce *equality of burden among direct competitors.* We concede, for the purposes of this argument at least, that the provision of the Constitution that excise taxes shall be uniform applies to geographical and not to any other kind of uniformity. It is, however, fundamental that arbitrary classification of subjects of taxation, without a reasonable differentiation due to the nature of the subjects under consideration, that a disregard of the great law that competitors under similar circumstances shall not be placed at a disadvantage between themselves by a more onerous burden of taxation being cast upon one than is placed up another, involves this conclusion,—that property is being taken without due process of law when these fundamental considerations are ignored in the attempted exercise of the taxing power. We unhesitatingly assert that the omission of individuals and partnerships from the operation of this statute under consideration and its limitation to corporations and its attempted taxation of corporations with respect to all their acts and transactions and with respect to all their income received from all sources, where individuals or partnerships carrying on similar businesses in competition with such corporations are not so taxed, involves an attempt to take from the corporations

their property without due process of law, and that such attempt should not receive the sanction of this Court.

But the Government, in effect, says: "Corporations and individuals are not competitors similarly situated. The corporation is carrying on its business with certain privileges and rights not possessed by individuals, under a body of legislation that does not apply to individuals." This argument wholly confounds the relation between the corporation and its competitors in business and the situation of the shareholders of the corporation. Again and again has it been held by this Court and by other courts that the corporate entity of the company is one thing, and that the interest of the shareholders in its property, in its business and in its franchises, represented and evidenced by their certificates of shares of stock, is quite another thing; that the interest of the corporation in its property is one kind of property, and that the interest of the shareholder in the shares of stock of the corporation is another kind of property; that taxation of the property of a corporation in the hands of the corporation and against the corporation is one species of taxation, and taxation of the shares in the hands of the shareholder is another kind of taxation. The whole line of decisions under which this Court held that United States bonds could not be taxed by the States through a system of taxation of its corporations or of their property, while such bonds could be in effect taxed by the States through the medium of taxing the shareholders of its corporations upon their interest in the capital stock of the corporations, rests upon this distinction. It is too late to abandon it and the present statute cannot be upheld.

The special legislation that is in the mind of the learned counsel for the Government is legislation that affects only the shareholder. Such legislation relates to freedom from liability *in solido* for the debts of the corporation, which, however, does not exist in all States, for in some States the shareholder of a corporation is liable for all its

debts and in other States to an amount equal to the par of the shareholder's stock. Legislation relative to the evidence of ownership in the capital stock of the corporation by certificates of stock and methods of transfer thereof, rules relative to the passing of title by delivery of the shares of stock, rules connected with the negotiable character, in whole or in part, of certificates of shares of stock,—all these matters affect the shareholder in his relations with the corporation, but do not affect the corporation in its relations to the business of the country or in its competition with individuals. What legislation can be said to confer upon a corporation advantages with regard to the transaction of business or the holding or conveyance of real or personal property that does not equally apply to individuals and co-partnerships? It is impossible to name any general rule or principle of law that gives a corporation as such any advantage over individuals or co-partnerships in the transaction of business, or the ownership of property, or that can be said in a general sense to afford a corporation special facilities in connection with the transaction of business or ownership of property.

This argument of the Government is intended to bring this statute within the limits of the Board of Trade case in Illinois (*Nicol v. Ames*), where a tax by the United States Government upon sales made at boards of trade or exchanges was upheld by reason of the facilities that were furnished by such voluntary associations of individuals, the Courts holding that the tax was on the facilities that such associations furnished in connection with sales of property. But there is no analogy between the cases. Indeed, in that case this Court said (173 U. S., p. 517):

> "This particular board is incorporated under an act of the legislature of Illinois, though its corporate character does not, in our judgment, form a material consideration in the inquiry."

In the transaction of business generally, corporations and individuals are subject to the same body of laws defining their rights and liabilities.

It follows that the statute must be held void and unconstitutional as an attempt to take property without due process of law, in that it provides for an arbitrary classification by taxing business of corporations and similar bodies alone, and violates the fundamental principle of *equality of burden of taxation among direct competitors.*

The operation of the statute with unequal effect upon direct competitors is in no instance more plainly shown than in the circumstance that it falls upon mutual life insurance companies and not upon savings banks. The former are within the reach of the statute, the latter, possessing no shares of capital stock, are exempt, notwithstanding mutual insurance companies possess no shares of capital stock and are not carried on for profit. Both of these classes of corporations are organized to promote thrift and habits of saving and to make provision for hard times, old age and the effects of death upon the fortunes of families. Both of these corporations are carried on only for the profit of those who are creditors of them. Both of these corporations are engaged simply in the business of investing savings that are either paid in as premiums upon policies or deposited in savings banks. These corporations are direct competitors with each other as means of hoarding the savings of the thrifty ones of the community. Yet mutual life insurance companies are taxed and savings banks are exempt. Surely, here is a case of arbitrary and confiscatory classification and the exclusion from subjects of taxation of competitors who belong in the same class with those who are included. The result necessarily is that, by the operation of the tax, the property of the mutual life insurance companies is taken without due process of law within the meaning and scope of the Fifth Amendment. It is needless to enumerate the many different kinds of businesses which, in view of the fact that many of the States now permit the formation of corporations for

the purpose of carrying on any lawful business, are carried on by corporations in direct competition with co-partnerships and individuals. It seems clear that the property of such corporations would be taken without due process of law if this tax were enforced against them, and not against individuals and copartnerships who carried on business in direct competition with them.

The provision of the statute that permits corporations to deduct from their net income interest on indebtedness not exceeding the amount of their capital stocks leads to an unreasonable and arbitrary classification among the corporations. Interest on indebtedness that has to be paid is just as much a dimunition of the profits of the corporation, if it be paid on indebtedness over and above the amount of the capital stock, as if it be paid on indebtedness equal to the capital stock. This provision bears with an especial burden upon the conservative corporations which have issued capital stock only for cash or property equal in value to the amount of stock issued, and is extremely beneficial to corporations which have recklessly, improvidently and without value received, issued large quantities of capital stock. To be sure, the statute refers to paid-up capital stock, but such capital stock may be issued for property taken at an exaggerated valuation and in that way made paid-up. This statute is an invitation to corporations not to keep down their indebtedness, but to unduly and improperly increase their capital stock. It is well known that it is comparatively easy for a corporation to enlarge its operations by acquiring property for use in its business for which it may become indebted, and extremely difficult in many instances for it to sell stock and in that way obtain the money to buy additional property. All these considerations make it plain that the effect of this provision is uniformly and improperly to discriminate between corporations who are direct competitors in the same kinds of business but which may find themselves in differing situations with regard to their comparative indebtedness and par value of issued capital stocks.

Fourth.

The vice of the provision requiring the corporation to make return is in the unrestricted character of the information sought to be elicited. The measures which have required a return of the receipts from particular licensed businesses are no precedent for such a search as is involved in ascertaining the income received by a corporation *from all sources.* Such income, as we have seen, does not depend upon any one occupation in which the corporation is engaged, but upon all the transactions and investments of the corporation, of any kind whatsoever. Requiring a return to show the facts upon which the net income of a corporation depends, leaves none of the corporation's concerns inviolate. The contention of the Government that a physical entry and search is the only sort prohibited is an anachronism. If compelling a litigant to allow inspection of his books or papers or produce them in court may, under certain circumstances, constitute an unreasonable search, surely compelling a taxpayer to make a verified statement based upon the contents of those books and papers may well be such a search. Indeed, the Supreme Court of Illinois, in *City of Clinton v. Phillips*, 58 Ill., 102, held that the requiring of a return of far more limited nature than the one under consideration was an unreasonable search, unreasonable for apparently no greater reason than that it was burdensome and necessitated an unwarranted interruption of the pursuit of a lawful business.

After the assessment has been made and after the entire process of ascertainment of the tax has been completed, the return is to be filed with the Commissioner of Internal Revenue and constitutes a public record open to inspection as such under the provisions of the sixth paragraph of this section 38 of the Tariff Act. It is believed that in no internal revenue law before the passage of this statute has any such provision ever occurred as that by which the returns of this tax are made public records and opened

to public inspection. If there be provisions in tax laws that make the sworn returns of individuals as to personal property public records, it is no precedent for the ruthless exposure of details of business to sharp and prying co-partnerships and individuals, who are competitors of corporations. It is the fact that in New York State there is no such provision with regard to publicity of personal property assessment returns, and such returns, as a matter of practice, are carefully guarded by the tax officers and are not public records.

Conclusion.

The argument of the learned Solicitor-General does not impair the fundamental propositions of appellant that the tax is unconstitutional because an unapportioned tax upon the income of property, or, if not that, because it is a tax upon the instrumentalities of the respective states, and that, in any case, it is invalid because so confiscatory in its nature and unequal in its operation as to constitute a deprivation of property without due process of law under the Fifth Amendment. The provisions with regard to the return are also unconstitutional as requiring an unreasonable search.

Dated New York, March 25, 1910.

Respectfully submitted,

JULIEN T. DAVIES,
Of Counsel for Appellant.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910

No. 19415

JOSEPH E. GAY, APPELLANT,

vs.

THE BALTIC MINING COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED FEBRUARY 2, 1910.

(22,001)

(22,001)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 775.

JOSEPH E. GAY, APPELLANT,

vs.

THE BALTIC MINING COMPANY ET AL.

PEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1910.

1 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday of October, being the nineteenth day of October, in the year of our Lord one thousand nine hundred and nine.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 676. Equity Docket.

JOSEPH E. GAY, Complainant,
v.
BALTIC MINING COMPANY et al., Defendants.

2 The Bill of Complaint in this cause is filed in the clerk's office on the twenty fourth day of January, A. D. 1910, and is duly entered at the present October Term of this Court, A. D. 1909, and is in the words and figures following:

Bill of Complaint.

(Filed January 24, 1910.)

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

Joseph E. Gay, of Jaffrey, New Hampshire, and a citizen of the State of New Hampshire, brings this bill against the Baltic Mining Company, a corporation organized and existing under the laws of the State of Michigan, a citizen of the State of Michigan, and having a usual place of business in Boston, in the State of Massachusetts, William A. Paine, of Boston in the State of Massachusetts, President and Director of said Company, and a citizen of the State of Massachusetts, Frederic Stanwood, of Milton, in the State of Massachusetts, Secretary and Treasurer of said Company, and a citizen of the State of Massachusetts, and Samuel L. Smith, of Detroit in the State of Michigan, and a citizen of the State of Michigan, Thomas S. Dee, of Brookline in the State of Massachusetts, and a citizen of the State of Massachusetts, J. Henry Brooks, of Milton in the State of Massachusetts, and a citizen of the State of Massachusetts, and R. T.
3 McKeever, of said Boston, and a citizen of the State of Massachusetts, Directors of said Company.

And thereupon your orator complains and says as follows:

1. That he is the holder of one hundred (100) shares of the capital stock of the Respondent, Baltic Mining Company, a corporation duly

organized and existing by virtue of the laws of the State of Michigan.

2. That the total capital stock of the said Respondent, Baltic Mining Company, already issued and outstanding consists of two million five hundred thousand dollars ($2,500,000) divided into one hundred thousand (100,000) shares of the par value of twenty-five dollars ($25.) each.

3. That by the terms of the articles of incorporation of the said Respondent, Baltic Mining Company, said Company is organized for the purpose of engaging in and carrying on the business of mining, refining and smelting copper and copper ores and minerals containing copper and copper ores, and manufacturing the same.

4. That the property and assets of the said Respondent, Baltic Mining Company, at the present time amount to more than two million dollars ($2,000,000).

5. That the net profits or income of the said Respondent, Baltic Mining Company, during the year ending December 31, 1908, as shown by its annual report submitted to its shareholders amounted to the sum of nine hundred thousand one hundred sixty-four dollars and sixty-eight cents ($900,164.68) above all ordinary and necessary expenses actually paid within the year out of the income of
4 the said Respondent, Baltic Mining Company, in the maintenance and operation of its business and properties, all sums paid for taxes imposed under the authority of the United States of America, the State of Michigan or the State of Massachusetts, all sums charged to depreciation of property, and after further deducting the sum of five thousand dollars ($5,000) from the gross income of said Respondent, Baltic Mining Company.

6. That under and by virtue of the alleged authority of the provisions of Paragraph 3 of Section 38 of an Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for Other Purposes," approved August 5, 1909, the Respondent, Baltic Mining Company, is liable on or before the first day of March, 1910, to make a true and accurate return under the oath or affirmation of its President, Vice-President, or other principal officer, and its Treasurer or Assistant-Treasurer, to the Collector of Internal Revenue for the Third District of Massachusetts, setting forth:

a. The total amount of the paid up capital stock of the said Baltic Mining Company outstanding on December 31, 1909.

b. The total amount of the bonded and other indebtedness of the said Baltic Mining Company on December 31, 1909.

c. The gross amount of the income of the said Baltic Mining Company received by it from all sources during the year ending December 31, 1909.

d. The total amount of all the ordinary and necessary expenses actually paid out of the earnings of the said Baltic Mining Company in the maintenance and operation of its business and prop-
5 erties within the said year ending December 31, 1909, stating separately all charges by way of rentals or franchise payments required to be made by it as a condition to the continued use or possession of its property.

e. The total amount of all losses actually sustained by the said Baltic Mining Company during the year ending December 31, 1909, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property.

f. The amount of interest actually paid by the said Baltic Mining Company within the year ending December 31, 1909, on its bonded or other indebtedness to an amount not exceeding its paid up capital stock.

g. All amounts actually paid by the said Baltic Mining Company within the year ending December 31, 1909, for taxes imposed under the authority of the United States, the State of Michigan or the Commonwealth of Massachusetts.

h. The net income of the said Baltic Mining Company after making all the deductions authorized in Paragraphs 2 and 3 of Section 38 of the said Act of Congress above mentioned.

7. That by virtue of the laws of the State of Michigan and the By-Laws of the said Respondent, Baltic Mining Company, regularly and lawfully adopted by the shareholders of the said Respondent, Baltic Mining Company, the management of the property, affairs and concerns of the said Respondent, Baltic Mining Company, is committed to its Board of Directors; and that under and by virtue of the alleged authority of the provisions of the Act of Congress set forth in Paragraph 6 of this Bill, Section 38 of said Act, the Respondent, Baltic Mining Company, is liable to pay and that the Respond-
6 ents, Directors of said Baltic Mining Company, intend to cause to be paid to the Commissioner of Internal Revenue for the United States of America for the use of the said United States, on or before the 30th day of June, 1910, and on or before the 30th day of June in each year thereafter, a tax of one per cent (1%) for the year ending December 31, 1909, and for each year ending December 31 thereafter, upon the entire net income of the said Respondent, Baltic Mining Company, over and above five thousand dollars ($5,000) received by it from all sources during such year, excepting dividends received by it from shares owned by it in other Companies which are themselves subject to the provisions of the Act of Congress above mentioned.

8. And your Orator further represents that the said provisions of Section 38 of the said Act of Congress above referred to providing for a tax of one per cent (1%) upon the entire net income over and above five thousand dollars ($5,000) of every corporation, joint stock company, or association, organized for profit, and having a capital stock represented by shares, are unconstitutional, null and void, as to the said Respondent, Baltic Mining Company, for the following reasons:

a. The provisions of Section 38 of said Act of Congress above mentioned originated in the Senate of the United States and were concurred in by the House of Representatives subsequent thereto. Whereas it is provided by the Constitution of the United States, Article I, Section 7, that all measures for raising revenue shall originate in the House of Representatives.

b. The said provisions of Section 38 of said Act of Congress above

mentioned constitute a violation of the provisions of the Fifth
7 Amendment of the Constitution of the United States, in that they deprive the said Respondent, Baltic Mining Company, and its shareholders, of their property without due process of law. And further that the said provisions impose no tax of this kind upon individual owners or operators of properties such as are owned or operated by the Respondent, Baltic Mining Company, and therefore that said provisions deny the said Respondent, Baltic Mining Company, and its shareholders the equal protection of the laws.

c. The said provisions of Section 38 of said Act of Congress above referred to constitute a direct tax in respect of the property held and owned by the said Respondent, Baltic Mining Company. Whereas it is provided in the Constitution of the United States, Article I, Section 9, that no capitation or other direct tax shall be laid by Congress unless in proportion to the census or enumeration in said Constitution directed to be taken.

d. That if said provisions of Section 38 of said Act of Congress above referred to do not constitute a direct tax on the property held and owned by the said Respondent, Baltic Mining Company, they must be a tax upon the franchise of said Company, and Congress has no power under the Constitution of the United States to impose a tax on franchises granted by a sovereign State of the Union.

9. That he has requested the Respondents, Directors of the said Baltic Mining Company, to refrain from filing any returns under the provisions of the said Act of Congress above referred to, with the Collector of Internal Revenue for the Third District of Massachusetts, and to refrain from paying any tax on the earnings of the said
8 Baltic Mining Company in accordance with the provisions of the said Act of Congress above referred to. A copy of your Orator's letter, written by his duly authorized attorney, to the Respondent, Paine, President of said Respondent, Baltic Mining Company, is hereto attached and marked "A."

10. That the Respondents, Directors of the said Baltic Mining Company, have, by vote duly passed, resolved and determined, and avowed their intention to comply with all and singular the said provisions of said Section 38 of the said Act of Congress above referred to by causing the Respondent, Paine, and the Respondent, Stanwood, to make the said return to the Collector of Internal Revenue for the Third District of Massachusetts, as provided in Paragraph 3 of Section 38 of said Act of Congress above mentioned, and by causing to be paid to the Commissioner of Internal Revenue for the United States of America for the use of the said United States, the said tax upon all the net profits or income of the said Respondent, Baltic Mining Company, as set forth in Paragraph 7 of this Bill. In accordance with said vote the Respondent, Paine, wrote your Orator, by letter addressed to his attorney, a copy of which letter of the Respondent, Paine, is hereto annexed and marked "B."

11. That if the said Respondents, Directors of the said Baltic Mining Company, shall cause the Respondent, Baltic Mining Company, to pay the said tax out of its gains, income and profits, as they have proposed and declared their intention of doing, they will dimin-

sh the assets of the said Respondent, Baltic Mining Company, and essen the dividends to be derived from its shares by its shareholders, and will thereby lessen the value of the said shares; and that a voluntary compliance with the provisions of said Section 38 of the said Act of Congress above mentioned will expose the said Respondent, Baltic Mining Company, to a multiplicity of suits by and on behalf of its shareholders, and that such suits will work irreparable injury to the business of the said Respondent, Baltic Mining Company, and will subject it to great and irreparable damage, to the great and irreparable damage of your Orator and all the shareholders of the said Respondent, Baltic Mining Company.

12. That the capital stock of the said Respondent, Baltic Mining Company, is divided among a number of persons, and that this Bill is filed for an object common to all of said shareholders, and your Orator therefore brings this Bill not only in his own behalf as a shareholder of the said Respondent, Baltic Mining Company, but also as a representative and on behalf of such of the other shareholders of the said Respondent, Baltic Mining Company, similarly situated and interested, as may from time to time choose to intervene and become parties to this Bill.

13. That he is now and has been since the formation of the said Baltic Mining Company the owner and registered holder of one hundred (100) shares of the capital stock of the said Respondent, Baltic Mining Company, of a value exceeding the sum of ten thousand dollars ($10,000); and that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

14. That the said Respondent, Baltic Mining Company, is not engaged in interstate commerce.

15. And your Orator further represents that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of costs, the sum of two thousand dollars ($2,000), that said suit arises under the Constitution or laws of the United States, and that said suit is furthermore a controversy between citizens of different States.

Wherefore your Orator prays:

1. That it may be decreed that the provisions of Section 38 of the said Act of Congress above mentioned, providing for the imposition of a tax of one per cent (1%) upon the entire net income over and above five thousand dollars ($5,000) of every corporation, joint stock company, or association organized for profit, and having a capital stock represented by shares, are unconstitutional, null and void, so far as they may apply to the said Respondent, Baltic Mining Company.

2. That each and every one of the said Respondents may be perpetually restrained from complying with the provisions of Section 38 of the said Act of Congress above mentioned, by making any lists, returns or statements, to the Collector of Internal Revenue for the Third District of Massachusetts, as aforesaid.

3. That each and every one of the said Respondents may be perpetually restrained from complying with the provisions of Section 38

of the said Act of Congress above mentioned, by paying any tax of one per cent (1%), on or before June 30, 1910, or at any time thereafter, on the net earnings of the said Respondent, Baltic Mining Company, for the year ending December 31, 1909, to the Commissioner of Internal Revenue for the United States of America.

4. That an injunction be issued by this Honorable Court restraining and enjoining the Respondents, and each and every one
11 of them, from making any list, return or statement, to the Collector of Internal Revenue for the Third District of Massachusetts, in conformity with Section 38 of the said Act of Congress above mentioned, or taking any steps preliminary to making said list, return or statement until the further order of this Court.

5. That this Honorable Court will decree to your Orator his costs of this suit.

6. That your Orator may have such other and further relief as the nature of his case requires.

New York, January 21st, 1910.

JOSEPH E. GAY.

STIMSON & STOCKTON,
HARRIS LIVERMORE.
Counsel & Solicitors for Petitioner.

STATE OF NEW YORK,
—— *New York*, ss:

NEW YORK, *Jan.* 21*st*, 1910.

On this 21st day of January, 1910, before me personally appeared Joseph E. Gay, to me known to be the person described in the foregoing Bill and made oath that the statements subscribed by him are true, except those which are alleged to be on information and belief, and as to those that he believes them to be true.

[SEAL.] HAMILTON L. WHITLOCK,
Notary Public, Notary Public Kings County.

Certificate filed — New York County.

12 "A."

DECEMBER 22, 1909.

William A. Paine, Esq., President Baltic Mining Co., 82 Devonshire St., Boston.

DEAR SIR: I write on behalf of Mr. Joseph E. Gay, a citizen of Jaffray, New Hampshire, and a stockholder in the Baltic Mining Company, to object to the payment by said Baltic Mining Company of any tax under the recent Act of Congress approved August 5, 1909, and further to object to the filing of any returns with the Collector of Internal Revenue for this District by the officers of said Baltic Mining Company.

I beg that you will take this matter up at the next meeting of your Board of Directors and present my letter for the action of the Directors thereon.

Will you kindly advise me at your earliest convenience what the intention of the Directors regarding said tax and returns may be?

Very truly yours, HARRIS LIVERMORE.

13 "B."

DECEMBER 30, 1909.

Harris Livermore, Esq., 53 State St., Boston, Mass.

DEAR SIR: I have yours of December 22nd in which, on behalf of Mr. Joseph E. Gay, a stockholder in our Company, you object to the payment by this Company of any tax under the recent Act of Congress approved August 5th, 1909, and also to the filing of any returns with the Collector of Internal Revenue for this District by the officers of the Company; and further request that the matter be taken up by the Board of Directors and that you be advised of the intention of the Directors regarding said tax and returns.

I have now to advise you that your letter was considered at a meeting of the Board of Directors held this day, and it was Voted to instruct the officers of the Company to file the returns with the Collector of Internal Revenue, and also to pay the tax, as required by law.

I regret that Mr. Gay, whom you represent, will not approve of our action, but as the law stands, the Directors do not feel there is any other course open to them.

Very truly yours,

WILLIAM A. PAINE, *President.*

14 On the twenty eighth day of January, A. D. 1910, the following Motion to Amend Bill of Complaint is filed by consent:

Motion to Amend Bill of Complaint.

(Filed by Consent Jan. 28, 1910.)

And now comes your orator in the above entitled cause and moves to amend his bill heretofore filed by striking out paragraph 5 thereof and substituting the following:

"5. That the net profits or income of the said respondent, Baltic MiningCompany,during the year endingDecember 31,1908,as shown by its last annual report submitted to its shareholders amounted to the sum of nine hundred thousand one hundred and sixty four dollars and sixty eight cents ($900,164.68) above all ordinary and necessary expenses actually paid within the year out of the income of the said respondent, Baltic Mining Company, in the maintenance and operation of its business and properties, all sums paid for taxes imposed under the authority of the United States of America, the State of Michigan or the State of Massachusetts, all sums charged to depreciation of property, and after further deducting the sum of five thousand dollars ($5,000) from the gross income of said respondent, Baltic Mining Company. And your orator is informed and believes that the net profits of the said respondent, Baltic Mining Company,

as above set forth, and after making the aforesaid deduction of five thousand dollars ($5,000) from its gross income have amounted during the year ending December 31, 1909, to not less than the aforesaid sum of nine hundred thousand one hundred sixty four dollars and sixty eight cents ($900,164.68)."

By His Solicitors, STIMSON & STOCKTON.
HARRIS LIVERMORE.

15 On the same day, the foregoing Motion to Amend Bill of Complaint is allowed by the Court, the Honorable Le Baron B. Colt, Circuit Judge, sitting.

Also on the same day, the following Demurrer is filed:

Demurrer.

(Filed Jan. 28, 1910.)

The demurrer of the Baltic Mining Company, William A. Paine, President and Director of said Company, Frederic Stanwood, Treasurer and Secretary of said Company, and Samuel L. Smith, Thomas S. Dee, J. Henry Brooks, R. T. McKeever, Directors of said Company, the above named respondents, to the bill of complaint of Joseph E. Gay, the above named complainant.

The respondents, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show as follows, namely:

That the complainant has not in and by his said bill made or stated such a case as entitles him in a Court of Equity to any relief against the respondents, or any of them, as to the matters contained in the said bill, or any of such matters.

16 Wherefore, and for divers other good causes of demurrer appearing on the said bill, the respondents do demur thereto. And they pray the judgment of this Honorable Court whether they shall be compelled to make any answer to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

CHARLES A. SNOW,
JOSEPH H. KNIGHT,
Solicitors and Counsel for Respondents.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

CHARLES A. SNOW,
Of Counsel for Respondents.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

JANUARY 28TH, A. D. 1910.

I, Frederic Stanwood, being duly sworn, depose and say that I am the Treasurer and Secretary of the Baltic Mining Company, and as

such am one of the above named respondents, and do further say that the foregoing demurrer is not interposed for delay.

FREDERIC STANWOOD.

Sworn to before me at Boston, Massachusetts, the 28th day of January, A. D. 1910.

CHARLES A. SNOW,
Justice of the Peace.

17 This cause is thereupon, to wit, January 28, 1919, set down for hearing and fully heard by the Court on demurrer, the Honorable Le Baron B. Colt, Circuit Judge, sitting as aforesaid, said demurrer being sustained by the Court.

On the same day, the following Final Decree is entered:

Final Decree.

January 28, 1910.

COLT, *J.:*

This cause came on to be heard upon the demurrer of the respondents to the complainants bill of complaint, and thereupon it is ordered, adjudged and decreed that the demurrer be allowed, and that the complainant's bill be and the same is dismissed, with costs to be paid by the complainant to the respondents.

By the Court:

CHARLES K. DARLING, *Clerk.*

18 From the final decree the complainant claims an appeal to the Supreme Court of the United States, and gives good and sufficient security that he will prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good and said appeal is allowed.

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

19 *Complainant's Appeal*

(Filed Jan. 29, 1910.)

And now comes the complainant in the above entitled cause and claims an appeal to the Supreme Court of the United States from the decree of this Honorable Court sustaining the demurrer of the respondents.

FREDERIC J. STIMSON,
L. M. STOCKTON,
HARRIS LIVERMORE,
Solicitors and of Counsel for Joseph R. Gay.

Assignment of Errors.

(Filed Jan. 31, 1910.)

1. The Court erred in ordering that the demurrer of the respondents be allowed, and in dismissing the bill of the complainant.

2. The Court erred in ruling that the provisions of Section 38 of the Act of Congress referred to in the complainant's bill are within the Constitution of the United States, and that the respondent, Baltic Mining Company, is liable to make the returns and pay the tax provided for in Section 38 of the said Act of Congress. Whereas the provisions of said Section 38 are unconstitutional, null and void as to the said respondent, Baltic Mining Company, for the following reasons:

a. The said provisions originated in the Senate of the United States and were concurred in by the House of Representatives subsequent thereto. Whereas it is provided by the Constitution of the United States, Article 1, Section 7, that all measures for raising revenue shall originate in the House of Representatives.

20 *b.* The said provisions constitute a violation of the provisions of the Fifth Amendment to the Constitution of the United States in that they deprive the said respondent, Baltic Mining Company, and its shareholders, of their property without due process of law; and further that the said provisions impose no tax of this kind upon individual owners and operators of mines and mining property, and therefore that said provisions deny the said respondent, Baltic Mining Company and its shareholders the equal protection of the laws.

c. The said provisions constitute a direct tax in respect of the property held and owned by the said respondent, Baltic Mining Company. Whereas it is provided in the Constitution of the United States, Article 1, Section 9, that no capitation or other direct tax shall be laid by Congress unless in proportion to the census or enumeration in said Constitution directed to be taken.

d. That if said provisions do not constitute a direct tax on the property held and owned by the respondent, Baltic Mining Company, they must be a tax upon the franchise of said company, and Congress has no power under the Constitution of the United States to impose a tax upon franchises granted by a sovereign State of the Union.

e. The tax imposed by the said provisions is not uniform
21 throughout the United States. Whereas it is provided by Article 1, Section 8 of the Constitution, that all duties, imports and excises shall be uniform throughout the United States.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Solicitors and of Counsel for Complainant.

22 *Bond to Party on Appeal.*

(Filed and Approved Jan. 31, 1910.)

Know all Men by these Presents, That We, Joseph E. Gay, of Jaffray, in the State of New Hampshire, and William G. Nickerson, of Boston, in the State of Massachusetts, are held and firmly bound unto The Baltic Mining Company, William A. Paine, Frederic Stanwood, Samuel L. Smith, Thomas S. Dee, J. Henry Brooks, and R. T. McKeever, in the full and just sum of two hundred dollars, to be paid to the said Baltic Mining Company, Paine, Stanwood, Smith, Dee, Brooks and McKeever, their certain Attorneys, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the thirty first day of January in the year of our Lord one thousand nine hundred and ten.

Whereas lately at a Circuit Court of the United States, held at Boston, within and for the District of Massachusetts, in a suit depending in said Court between Joseph E. Gay and the Baltic Mining Company and others, decree was rendered against the said Joseph E. Gay and the said Joseph E. Gay having obtained an Appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Baltic Mining Company, Paine, Stanwood, Smith, Dee, Brooks, and McKeever, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the 26th day of February, A. D. 1910.

Now the condition of the above obligation is such, that if the said Joseph E. Gay shall prosecute his said Appeal to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOSEPH E. GAY, [L. S.]
By HARRIS LIVERMORE, *Attorney.*
WILLIAM G. NICKERSON. [L. S.]

Signed, sealed and delivered in presence of
A. A. ASHMAN.

This bond is satisfactory to the respondents and is approved by their counsel.

CHARLES A. SNOW.
JOSEPH H. KNIGHT.

Approved:
LE BARON B. COLT,
United States Circuit Judge.

23 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Baltic Mining Company, a corporation organized and existing under the laws of the State of Michigan, a citizen of the State of Michigan, and having a usual place of business in Boston, in the State of Massachusetts; William A. Paine, of Boston, in the State of Massachusetts, President and Director of said Company, and a citizen of the State of Massachusetts; Frederic Stanwood, of Milton, in the State of Massachusetts, Secretary and Treasurer of said Company, and a citizen of the State of Massachusetts, and Samuel L. Smith, of Detroit, in the State of Michigan, and a citizen of the State of Michigan; Thomas S. Dee, of Brookline, in the State of Massachusetts, and a citizen of the State of Massachusetts; J. Henry Brooks, of Milton, in the State of Massachusetts, and a citizen of the State of Massachusetts, and R. T. McKeever, of said Boston, and a citizen of the State of Massachusetts, Directors of said Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the* twenty sixth day of February next, pursuant to an Appeal duly obtained from a decree of the† Circuit Court of the United States for the District of Massachusetts, wherein Joseph G. Gay, of Jaffray, New Hampshire, and a citizen of the State of New Hampshire, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Judge of the Circuit Court of the United States for the District of Massachusetts, this 31st day of January, in the year of our Lord one thousand nine hundred and ten.

LE BARON B. COLT,
U. S. Circuit Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

24 *Acknowledgment of Service on Citation on Appeal.*

BOSTON, *January* 31*st*, 1910.

Due service of the within citation is hereby acknowledged.

CHARLES A. SNOW,
JOSEPH H. KNIGHT,
Solicitors and Counsel for Appellees.

5 *Clerk's Certificate.*

NITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the Circuit Court of the United tates for the District of Massachusetts, within the First Circuit, ertify that the foregoing is a true copy of the record and all proceedngs in the cause in equity entitled, No. 676, Joseph E. Gay, Complainant, v. Baltic Mining Company et al., Defendants, in said Circuit Court determined, the Complainant's Appeal, the Assignment of Errors, the Bond on Appeal, and also the original Citation issued upon the appeal of the complainant in said cause, with the Acknowldgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this thirty first day of January, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,001. Massachusetts C. C. U. S. Term No. 775. Joseph E. Gay, appellant, vs. The Baltic Mining Company et al. Filed February 2d, 1910. File No. 22,001.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 775.

JOSEPH E. GAY, APPELLANT,

v.

THE BALTIC MINING COMPANY ET AL.

MOTION TO ADVANCE CASE FOR ARGUMENT.

Comes now the appellant in the above entitled case and moves that this Honorable Court may advance the said case for hearing on March 14, 1910, for the following reasons:

1. That the matters involved in said case concern the constitutionality of the provisions of Section 38 of an Act of Congress, approved August 5, 1909, entitled "An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and For Other Purposes".

2. That he is informed that this Honorable Court has advanced for argument on March 14, 1910, certain other cases involving the constitutionality of said Section 38 of said Act of Congress, one of which cases is entitled *Flint* v. *Stone Tracy Company*.

3. That the respondent corporation, Baltic Mining Company, is engaged in the business of mining copper entirely within the State of Michigan.

4. That he therefore believes that the said case entitled *Joseph E. Gay* v. *Baltic Mining Company and others*

involves the consideration of questions of law which arise in the said cases already advanced for argument, and furthermore involves additional questions of law arising under Section 38 of said Act of Congress above referred to.

5. That the decision of this Honorable Court in said case entitled *Joseph E. Gay* v. *Baltic Mining Company and others* will be of great and immediate importance to him and is a matter of general public interest in that it will affect a great number of shareholders in similar corporations.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Counsel and Solicitors for Appellant.

Supreme Court of the United States.

JOSEPH E. GAY

v.

THE BALTIC MINING COMPANY *et al.*

BRIEF OF THE APPELLANT, JOSEPH E. GAY.

I.

Admitting, for the purposes of this paragraph, that Section 38 of the Act of Congress of August 5, 1909, imposes, as it alleges, an excise tax on the doing of certain businesses, it is not "due process of law" within the meaning of the Fifth Amendment to the Constitution of the United States, in that it does not apply to individuals; and that, while it does apply to "associations," it does not apply to partnerships carrying on the same business.

The War Revenue Act of 1898, sustained in

Spreckels, etc., Co. v. *McClain*, 192 U.S. 397,

applied equally to all corporations and persons engaged in the business taxed. Moreover, it applied not, as here, to income derived "from all sources," but to "gross receipts . . . in their respective business." So, even the banknote tax law applied to notes of any *person*, state bank or state banking association "used for circulation and paid out" by national or state banks.

Veazie Bank v. *Fenno*, 8 Wall. 533, 539.

So also as to the statute of Missouri discussed in

Pacific Express Co. v. *Siebert*, 142 U.S. 339, 340,

which applied to "Any person, persons, joint-stock association, company or corporation" doing an express business.

Corporations are persons within the meaning of the Fifth Amendment and the property clauses of the Fourteenth Amendment.

Pembina Mining Co. v. *Pa.*, 125 U.S. 181, 189;
Covington Co. v. *Sandford*, 164 U.S. 578, 592;
Gulf, Colorado & Sante Fe Ry. v. *Ellis*, 165 U.S. 150–154;
Smyth v. *Ames*, 169 U.S. 466, 522,

and, especially as to taxation, see

Railroad Tax Cases, 13 Fed. 722; 18 Fed. 385.
Southern Railway et al. v. *Georgia*, decided by this Court February 21, 1910.
Guthrie on the Fourteenth Amendment, pp. 113, 119.
Mr. Justice Field, in *San Bernardino Co.* v. *Southern Pacific R.R.*, 118 U.S. 417, 422.
N.P. R.R. v. *Walker*, 47 Fed. 681, 686.

"A company lawfully doing business in the State is no more bound by a general unconstitutional enactment than a citizen of the State."

Holmes, J., in *Carroll* v. *Greenwich Ins. Co.*, 199 U.S., 409.

In other words, corporations have all *property* rights guaranteed by the Federal Constitution, though they may not have all the personal liberty rights appropriate to natural citizens, for instance, such as are declared by Article IV., Section 2, Clause 1, of the Federal Constitution. In other respects they are citizens.

In the various constitutions the phrases "due process of law" and "law of the land" are "used interchangeably . . .

but they are synonymous"; the words of the Fourteenth Amendment confer no new rights, but add a Federal guaranty against State action; and both Fifth and Fourteenth Amendments presuppose equality before the law.

Harding v. *People*, 160 Ill. 459; S.C. 32 L.R.A. 445, 447, and cases cited.
Carroll v. *Greenwich Ins. Co.*, 199 U.S. 401, 410.
Mobile R.R. v. *Tennessee*, 153 U.S. 486, 506.
Cooley, "*Constitutional Limitations*," Sixth Edition, pp. 479–483.

"It was not within the power of the States *before* the Fourteenth Amendment to deprive citizens of the equal protection of the laws."

Cooley, *ibid.*, p. 490.

Could the laws supposed by Mr. Justice Brewer in

Gulf, Colorado & Sante Fe Ry. v. *Ellis*, 165 U.S. 150 at p. 155,

have been enacted by the Federal Government under the Fifth Amendment?

The words "due process of law" in the Fifth Amendment have therefore the full meaning and intention more amply expressed in the Fourteenth Amendment by the addition of the words "equal protection of the laws." The latter phrase was but added to make clear, and with special reference to statutes, as the use of the plural in the word "laws" shows. The Fifth Amendment is the modern expression of the famous clause ending with the words "*vel per legem terrae*" in the Magna Carta of King John (Cap. 39), as amplified in the corresponding words in the Magna Carta of Henry III. (Cap. 35) two years later by the addition "*de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis*" after the word "*dissaisietur*," and expressed in modern language by the words "due process of law" in Edward the Third's Confirmation of the Charter (Cap. 3) in 1354. The principle of equality before the law was even anterior to Magna

Carta, dating at least from the Charter of Liberties of Henry II. (1154). For comparison of these phrases, see

Stimson's Federal and State Constitutions of the United States, pp. 75, 80, 90.

Taswell-Langmead, English Constitutional History, Sixth Edition, quoting Coke, pp. 104–107.

Hannis Taylor, Origin and Growth of the English Constitution, Vol. II., p. 3.

Words in the Federal Constitution, as is well known, are to be construed and extended according to their full historical meaning acquired at the time of its adoption.

Cooley, Principles of Constitutional Law, Fourth Edition, p. 387.

Mattox v. *U.S.*, 156 U.S. 237,

Kepner v. *U.S.*, 195 U.S. 100,

and for a historical discussion, see

Stimson's Federal and State Constitutions of the United States, pp. 6, 7 and (as to equality before the law) p. 16.

Unequal taxation, not based upon a reasonable classification, is not "due process of law," and an excise tax imposed on the doing of business, like a simple property tax (save where imposed as a charter limitation by the sovereignty creating a corporation), must apply alike to all persons and all corporations engaged in the same business. A franchise tax may be imposed in lieu of or in addition to a simple property tax, but where the tax is not imposed upon the charter to do business as a corporation as such, it must apply equally to corporations and individuals.

II.

If not a simple excise tax on the doing of business it can only be an excise tax on the doing of business *under a corporate charter*. There can be no distinction between this and a tax on

the charter itself. For instance, if the Federal Government may not impose a tax on the amount of the capital stock authorized on the day that a State corporation charter is granted, it may not impose an annual tax on the doing of business thereunder. Neither State nor Nation — governments of equal dignity in their respective spheres — may impose such tax upon each other's corporations, save only so far as they are property taxes imposed by the States, or taxes imposed by the Federal Government in the exercise of functions otherwise constitutional. "The States cannot directly or indirectly burden the exercise by Congress of the powers committed to it by the Constitution, nor may Congress burden the agencies or instrumentalities employed by the States in the exercise of their powers."

Argument of Mr. Solicitor General Hoyt for the Government in *Spreckels Co.* v. *McClain*, 192 U.S. 404.

Collector v. *Day*, 11 Wall. 113–124.

Fifield v. *Close*, 15 Mich. 505, cited with approval in Cooley's Constitutional Limitations, Sixth Edition, p. 592.

A State may not tax the corporate franchise of a Federal corporation,

McCulloch v. *Maryland*, 4 Wheat. 316,

California v. *Central Pacific R.R.*, 127 U.S. 41,

nor may it tax its business if it be a Federal function, such, for instance, as interstate commerce; nor can a State impose a franchise tax even on the stock of corporations incorporated in other States and doing business in the State imposing the tax, if it do not tax its own corporations in the same manner.

Southern Railway v. *Georgia*, *supra*.

Western Union Telegraph Co. v. *Kansas*, 30 S.C.R. 190.

That the Act in question imposes the tax also on United States corporations does not save it. Neither sovereignty can impose a naked tax upon corporate franchises granted by the other.

The power to impose the tax in question is "exercised for ends inconsistent with the limited grants of power in the Constitution" within the meaning of these words by Chief Justice Chase in

Veazie Bank v. *Fenno*, 8 Wall. 541.

See also

Lane Co. v. *Oregon*, 7 Wall. 71, 76.

Even Chief Justice Chase's opinion in the Veazie Bank case does not decide that Congress may impose a tax on a State corporation franchise, although "not conferred for the purpose of giving effect to some reserved power of a State."

Veazie Bank v. *Fenno*, 8 Wall. 547.

In

South Carolina v. *United States*, 199 U.S. 437,

the tax was only imposed on the agents of a State so far as they were engaged in a business constitutionally taxable and always an important branch of the Federal revenue.

"The creation of a corporation, it is said, appertains to sovereignty. This is admitted."

Marshall, C. J., in McCulloch v. *State of Maryland*, 4 Wheat. 410.

III.

If not an excise tax or a tax upon a corporate franchise, it must be a property tax, a direct tax imposed in part at least, upon the income derived from real and personal property, and as such invalid,

Pollock v. *Farmers Loan & Trust Co.*, 157 U.S. 429; S.C. 158 U.S. 601.

The Spanish War tax, as has been said, was but a tax on business earnings.

Spreckels Co. v. *McClain*, *supra*, discussed above in I.,

while the case of *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, cited in *Springer* v. *U.S.*, 102 U.S. 586,

which itself was reversed by the Pollock case, discussed the same law (Act of June 30, 1864, 13 Stat. at Large, Sects. 105, 120), and rests on the reasoning of the Springer case. And that a direct income tax imposed upon a corporation would be equally invalid with one imposed upon a natural person, and this tax be furthermore invalid even if an income tax, for the reason that it is not imposed on natural persons, see cases cited under I.

A tax on the profits of a mining company may, indeed, be said peculiarly to be a direct tax. It is a tax on a portion of the land itself. Moreover, it is more than a mere income tax; it is a tax on the very corpus of the property; for the Court will take notice that the sales of ore represent in no sense *income*, but rather a portion sold of the land itself. Mining companies present a case of "wasting investment." The smelting that may be engaged in is merely a part of the preparation of its own ore for the market.

IV.

Is there any possibility that there be a *tertium quid* — that this tax be neither an excise tax on business under State charters nor a direct property tax, but an excise on a "commodity" either natural or existing under State statutes, such as was sustained in *Knowlton* v. *Moore*, 178 U.S. 41?

For, while States can tax any commodity not an agency or function of the Federal Government, so the Federal Government may tax any "commodity" — short only of a necessary attribute of sovereignty, such as is the granting of corporate charters, either for the development of the business industry and prosperity of the State itself, its cities and towns, harbors and highways, or for ordinary business purposes.

The arbitrary taxes imposed in England in the past can be no guide to us, for they have no constitution protecting the

citizen against an Act of Parliament, although invading cardinal rights, despite the judgment of Coke to the contrary. But even their Parliament has never imposed a tax upon mere divisibility.

See

Cobbett's Parliamentary History of England,

covering the years from 1066 to 1803, where the system of taxation is fully described at the end of each reign. Window taxes, taxes on carriages, or on the number of servants employed, and a thousand others, have been imposed; but never one upon the mere division of property into parts, as, for instance, on tenants in coparcenary, or joint owners not dividing their interests under a corporate franchise. So in the United States, while important instances of Federal taxation on commodities or rights may be found, —

Scholey v. *Rew*, 23 Wall. 331.
Nicol v. *Ames*, 173 U.S. 509;
Knowlton v. *Moore*, *supra;*
Patten v. *Brady*, 184 U.S. 608, —

there has hitherto been none on the mere possibility of dividing or the actual division of property, except, of course, upon the deeds or conveyances making such division. In Massachusetts there has existed legislation since the seventeenth century recognizing unincorporated proprietors of fields or wharves held in common, but no taxation has ever been imposed on such divisibility, although the creature of statute, other than the direct tax on the land itself. Thus, in 1698 we find an Act recognizing and authorizing the discontinuance of general fields,

Mass. Statutes, 1698, Chap. 12, Sect. 5;

in 1712, an Act authorizing such proprietors of "lands, wharves, or other real estate" to incorporate,

Mass. Statutes, 1712–1713, Chap. 9;

in 1785, an Act authorizing the proprietors of general fields to manage them and assess the proprietors *without* incorporation,

Mass. Statutes, 1785, Chap. 53,

but never an act taxing such right to hold them as proprietors in common.

So under the Federal Constitution, it is submitted that where property or business is non-taxable either by State or Nation, the mere division of such business or property into shares may not be taxed. There has never in England or America been a tax upon shares owned in ships, independent of the tax on the ship as a whole. If a whole apple is not taxable, the owners of the apple when halved are not for that reason taxable under due process of law.

Finally, that this is not intended for such a tax appears from the fact that insurance companies, though not having a capital stock represented by shares, are included.

V.

As to the inquisitorial provisions of this Act, whether or not they be unconstitutional as to corporations under the Fourth Amendment, they certainly remain unequal and discriminatory under the Fifth Amendment.

It is admitted that all reasonable inquisitory methods may be instituted in order to determine the assessment of a tax constitutionally imposed,

Hale v. *Henkel*, 201 U. S. 43,

but it is not only questionable, but was admitted in the debates in Congress that the requirements of this Act go far beyond such necessary inquisition.

And conceding the correctness of Mr. Justice Harlan's dissenting opinion in *Hale* v. *Henkel*, it may yet be urged that its reasoning applies only to a corporation under investigation by the sovereignty which created it. Inquisitions by other sovereignties, even for lawful purposes of revenue, must be judged by the ordinary constitutional law applicable to individuals. That is, the Federal Government in ordering this inquisition is not, as in *Hale* v. *Henkel*, conducting an investigation into the affairs of a corporation which it created, or which, by reason of the interstate

commerce clause of the Constitution, is subject to its jurisdiction and control.

VI.

If the Congress have any power under the Constitution to tax the earnings and profits of State corporations and not of individuals, it is only under the Interstate Commerce law of the Constitution. Incomes or profits derived from interstate commerce by persons and corporations, or either, may, perhaps, be taxed by the Congress, — not as a direct tax, but as a prerequisite to doing such business.

This legislation, Section 38 of the Act of August 5, 1909, with the prior legislation creating the Federal Bureau of Corporations, was apparently based upon the Report to Congress of the United States Industrial Commission of 1902. All the reasons given for such legislation in the debates in Congress are there anticipated, but that report, while it recommended Federal taxation of corporations engaged in interstate commerce, carefully limited it to such.

> *Final Report, U.S. Industrial Commission*, Vol. XIX., pp. 647, 648, 649, 650, 651, 687, 691, 696, 708, 710, 715, 719, 720.

"The privilege or facility offered to a corporation to engage in interstate commerce is of two kinds: First, the privilege to be a corporation, which is derived from the State and cannot be taxed by the Federal Government, and second, the privilege to engage in interstate commerce, which is beyond the control of the States and within the control of Congress, and may therefore be taxed by the power that confers or permits it."

> *Ernest W. Huffcut on Constitutional Aspects of Federal Control of Corporations, ibid.*, p. 721.

VII.

That the provisions of this Section 38 originated in the Senate and were added to a complete bill originating in the House, appears from the House and Senate Journal.

H.R. (1909), No. 1438, and Conference Report, Journal of Senate (1909), p. 175.

It was avowedly not primarily a revenue measure, but one aimed at Federal control of corporations, and is not *in pari materia* with the rest of the House bill.

Message of the President, June 16, 1909, in Journal of Senate, pp. 109, 110.

While conceding that in ordinary cases it may be impossible to investigate the history of a measure finally duly enacted into law, there must yet be some limit to the ability of the two Houses of Congress to disregard this principle. In England it may be admitted that a violation of the Constitution in this particular can only be resented by that House whose prerogatives are infringed; as, for instance, the House of Commons in the case of the present Budget. But under our written Constitution, not only a measure contrary to its principles, but one enacted in a manner contrary to its provisions, is absolutely void. The lower House may not violate Article I., Section 7, of the Constitution by the mere act of ratification of the unconstitutional action of the Senate.

The Constitution provides (Art. 1, Sect. 5, Cl. 3) that "Each House shall keep a Journal of its proceedings. . . ." It has been held that a statute is not even *prima facie* valid when other records of which the Court must equally take notice (*i.e.*, Journals of House and Senate) show that some constitutional formality is wanting.

Cooley, J., in *People* v. *Mahaney*, 13 Mich. 481.

And in general it has been held in many States that for the purposes of ascertaining whether an act has been passed according to

the forms required by the Constitution the Courts take judicial notice of records as contained in legislative journals.

State v. *Smith*, 44 Ohio St. 348.
People v. *Rice*, 64 Mich. 385.

VIII.

Constitutional authority for this section of the Act in question must be affirmatively expressed among the powers given to it by the Constitution or be necessary or proper therefor. If not so given — particularly if negatived in divers clauses of the Constitution itself — they are reserved to the States by the Tenth Amendment.

And there is a larger question than the mere revenue question here involved. Avowedly this tax is imposed for the purpose of bringing all corporations, and that immense preponderance of business, manufacturing, mining, commercial or trading now carried on by State corporations, under the supervision, control, and taxing power of the Federal Government. This high Court will consider the Act of Congress in its true intent and with full regard to its ultimate consequences, and in judging it will apply the Constitution in its broadest spirit and meaning. The people in establishing it meant to keep their ordinary property rights and domestic affairs free from control by the central Government. That question, not merely political but in the highest sense constitutional, is legitimate subject for argument.

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."

Marshall, C. J., in McCulloch v. *State of Maryland*, 4 Wheat. 403.

JOHN G. JOHNSON. FREDERIC JESUP STIMSON.

LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Of Counsel.

Supreme Court of the United States.

No. 425. October Term, 1910.

Joseph E. Gay, *Appellant*,

v.

The Baltic Mining Company *et al.*

SUPPLEMENTARY BRIEF OF THE APPELLANT, JOSEPH E. GAY.

I.

It appears from the briefs and arguments on the first hearing of these cases that the radical question involved is the power of the National Government to impose a tax simply on the franchise, or (what is the same thing) the profits of the use of such franchise of corporations, public service or otherwise, whether or not engaged in interstate commerce, which are now created by the States; it being admitted that the States cannot tax in like manner corporations created by the Federal Government.

Stated most favorably the argument for the Government is that the present tax is uniformly imposed, not only on State corporations, but on Federal corporations of like nature. A sufficient reply to this is that a State law taxing both State and Federal corporations directly on their franchise without the permission of Congress would be, as to the Federal corporation so

taxed, quite as unconstitutional as a law taxing Federal corpora
tions only; indeed *McCulloch* v. *Maryland* so held on such
State law.

This, the position of the present appellees, has never bee
challenged except as it was suggested, *obiter*, by Chief Justic
MARSHALL in that case, that the Federal Government is a sov
ereignty of superior power to a State's, — even in those matter
that belong clearly to the State's domain and which are reasonabl
necessary for its prosperity or the well-being and the liberties o
its people and which have never been surrendered to the Feder
Government. But one other dictum can be cited in support o
this proposition, and only once does the Government claim tha
it may have been covered by a case decided. So we have, for th
Government's only authorities on this point (1), MARSHALL
words in 4 Wheaton, 435, "The difference is that which alway
exists and always must exist between the action of the whole on
part and the action of a part on the whole." — But the whole rang
of decisions of this honorable Court since *McCulloch* v. *Maryla*
is to deny the accuracy of the view which conceives the State b
as *a part* of the Federal Government; and MARSHALL himself,
the end of the sentence, seems to admit that a State Governmen
when not in opposition to Federal law, is as supreme as is t
Federal Government in its own domain; and furthermore, h
very next paragraph admits his doubt of the right of Congress to t
the State banks. (2), CHASE'S words in *Veazie Bank* v. *Fen*
(8 Wall. 547) — "it cannot be admitted that franchises granted
a State are necessarily exempt from taxation; for franchises
property, often very valuable and productive property; and wh
not conferred for the purpose of giving effect to some reserv
power of a State, seem to be as properly objects of taxation
any other property;" — words entirely unnecessary to the de
sion and which indeed but serve to indicate the doubt in his o

mind — for after all what is the reserved power of the State? Moreover, it is evident that he is thinking of a franchise in the ordinary use of the word, such as a franchise to maintain a railway in a street, and not of the bare franchise to be a corporation; and in the very next sentence he hastens to say — "But in the case before us the object of taxation *is not the franchise of the bank.*" (3), The case of *Railroad* v. *Collector* (100 U.S. 595). But here the constitutional point was not raised; the tax was considered a tax upon the income of the company or in this instance upon the property of a non-resident alien, and resisted solely upon that ground; and the corporations taxed were, as a matter of fact, interstate commerce corporations. (We make no question of the power of the Federal Government to impose taxes upon corporations, State or National, engaged in interstate commerce, or even to prohibit the right of the States to charter corporations for such purpose.) Moreover, the Court, speaking through Mr. *Justice* MILLER (p. 599), said: "the tax is laid by Congress on the net earnings, which are the results of the business of the corporation;" and on page 596, "the case is of little consequence as regards any principle involved in it as a rule of future action."

Now MARSHALL'S words in *McCulloch* v. *Maryland* were spoken *obiter* in the heat of what might almost be called a judicial argument supporting Federal power, at a time when the great interpreter of the Constitution was above all anxious to make no admissions which might later embarrass his theories of the Constitution. They are as unnecessary to the decision as *Chief Justice* TANEY'S constitutional argument in the Dred Scott case (19 Howard, 431–452), and they are immediately followed by MARSHALL'S admission that the power to create corporations is necessary to sovereignty (4 Wheaton, p. 410).

It is true that against these guarded claims of MARSHALL and CHASE or, more accurately, their reservation of a future right to

claim this power if necessary, we have no decided case; for Congress has never until now attempted to tax the franchise of a State corporation.

It comes up, therefore, as a new question, as new as the question then was which MARSHALL was considering in *McCulloch* v. *Maryland;* a new question and one of transcending importance to the people and the States, not, indeed, as a revenue question, but as one of the State's autonomy. We respectfully urge that upon such a matter this Court will consider, not indeed the ultimate motives of Congress and the President in enacting this legislation, but its necessary and obvious consequences, both to the people, to the States and to their relation to the Federal Government; and that it will also consider the words spoken by this Court, through nearly all its Justices, in the many cases decided in the ninety years that have elapsed since *McCulloch* v. *Maryland* was decided, whereby it is apparent that had such a law been directly in question the opinion of this Court would have been against the constitutional power to enact it.

The general power of taxation of the Federal Government is unlimited. The title of the 31st letter in the Federalist is, "Unlimited National Taxation not a Road to Despotism." But Hamilton himself says that the Federal Government must be invested with an unqualified power of taxation only "in the ordinary modes." Is the power nakedly to tax a state corporation franchise which might — and may — be so exercised as to deprive the people of the right to do business in their State under a corporate form, and the States themselves of creating corporations for any purpose, an *ordinary* mode?

For although to-day the law taxes Federal and State corporations equally, to-morrow it may remit the tax on the former and make the latter prohibitive — as it has once in our history already done — but then under an expressed Federal power, that

of regulating the currency. In the Veazie Bank case, indeed, the tax was not upon a state franchise, but upon a comparatively small part of the business done under that franchise; yet that case remains the great historic instance of the use by the Federal Government of the power to tax as the power to destroy. Justices Nelson and Davis, indeed, dissented; they would not admit that even an express Federal power gave the right to invade and destroy a reserved power of the States. Their words (8 Wallace, 554, 555) remain uncontradicted on this point, — for the majority opinion expressly declares (8 Wallace, 547) that — "the object of taxation is not the *franchise* of the Bank." So again where they say (p. 556), "This taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the Government, or in the opinions of the illustrious statesmen who founded it" — these words were unchallenged in the majority opinion, which is based simply on the express power given in Article I., Section 8, Clauses 2, 5, of the Constitution.

One can hardly, without apology, venture to remind this honorable Court of a few of the cases in which it has held that the States are not subordinate, not "a part" of the Federal Government in the sense of being a part of a homogeneity, but are sovereignties of equal dignity, indestructible, equally important, and in their own demesne equally supreme.

By *Chief Justice* CHASE himself in *Texas* v. *White* (7 Wall. 700, 725): "But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or the right of self-government by the States. . . . We have already had occasion to remark at this term, that the 'people of

each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

And again, in *Lane County* v. *Oregon* (7 Wall. 71, 76), he says: "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. . . . Now to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. . . . It is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered."

By *Mr. Justice* NELSON in *Bank of Commerce* v. *New York City* (2 Black, 620, 633): "That government whose powers, executive, legislative or judicial, whether it is a government of enumerated powers like this one, or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. . . . it is only by a wise and forbearing application of it that the operation of the powers and functions of the two governments can be harmonized. . . . Each is sovereign and independent in its

sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and, influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared."

By *Chief Justice* FULLER in *Pollock* v. *Farmers Loan & Trust Co.* (157 U.S. 429, 583, 584): "The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers.

"As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State." And he concludes with approval of *Mr. Justice* NELSON'S words in *Collector* v. *Day* (11 Wall. 113, at p. 124): "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." And again (p. 126): "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality. . . . And it will be noted that this opinion affirms the opinion of *Mr. Justice* CLIFFORD in the Lower Court, cited at length in the brief of Messrs. Evarts & Wardner in (old) No. 747 *Flint* v. *Stone Tracy Co.* (p. 32), from 3 Clifford, 389: "The proposition of the defendant is in substance and effect

that the States cannot tax the instruments and means of the government of the United States, because the Federal government is supreme, but that the latter may tax the instruments and means of the State governments, because, as he assumes, the States are subordinate to the United States in the same unqualified sense as the counties of a State are to the paramount authority by which they were created. Unquestionably the Constitution and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are the supreme law of the land, because it is so ordained in the Constitution, but the same instrument also provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people, and it is an obvious rule of construction that these two provisions must be considered together in determining the question under consideration, as they are important provisions in the same instrument, and cannot be regarded as in any respect repugnant to each other." So, in *Dobbins* v. *Commissioners* (16 Peters, 435), by *Justice* WAYNE (p. 447): "Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is co-extensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject, by express prohibitions in the Constitution. And the States, by such as are necessarily implied when the exercise of the right by a State conflicts with the perfect execution of another sovereign power, delegated to the United States."

By GRAY, J., in *Van Brocklin* v. *Tenn.* (117 U.S. 151, 155),

quoting the thrice-repeated words of Marshall from *Weston* v. *Charleston* (2 Pet. 449, 467): "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; . . . The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another;" and on page 177 *Mr. Justice* GRAY himself says: "this Court has held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State." Of the two great text writers, Story in his early editions, quoting No. 31 of the Federalist (Constitution of the United States, Third Edition, Vol. 1, p. 655) says: "It is not true, because the exigencies of the union may not be susceptible of limitation, that its power of taxation ought to be unconfined. Revenue is as requisite to the purposes of the local administrations as to those of the union; and the former are at least of equal importance with the latter to the happiness of the people. It is, therefore, as necessary that the State Government should be able to command the means of supplying their wants as that the National Government should possess the like faculty in respect to the wants of the union. But an indefinite power in the latter might, and probably would in time, deprive the former of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. . . . It might at any time abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity of doing this in order to give efficacy to the national revenue; and thus all the resources

of taxation might by degrees become the subjects of Federal monopoly, to the entire exclusion and destruction of the State governments." But he merely then (p. 721) copies MARSHALL'S words without comment, and concludes (p. 726) that Congress may, without doubt, tax State banks; "when Congress taxes the chartered institutions of the State they tax their own constituents;" but the later editions query this, citing the cases of *Thompson* v. *Pacific R.R.* (9 Wall. 579) and *National Bank* v. *Commonwealth* (9 Wall. 353). In the former case *Chief Justice* CHASE says (p. 588), combatting the view that the railroad was free even from taxation on its property by the State, "the case of *McCulloch* v. *Maryland* is much relied on in support of this position. But we apprehend that the reasoning of the Court in that case will hardly warrant the conclusion which counsel deduce from it in this . . . (p. 589). It must be remembered that the Bank of the United States was a corporation created by the United States. . . . It did not owe its existence or any of its qualities to State legislation, and its exemption from taxation was put upon this ground . . . (p. 590). It is true that some of the reasoning in the case of *McCulloch* v. *Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the Bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States."

On the other hand, Cooley (Constitutional Law, 3d edition, p. 61) holds a different opinion: "The power to tax, whether by the United States or by the States, is to be construed in the light of, and limited by, the fact that the States and the Union are inseparable, and that the Constitution contemplates the perpetual maintenance of each, with all its constitutional powers, unembarrassed and unimpaired by any action of the other. . . . It is true that taxation does not necessarily and unavoidably destroy, and

that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very power would take from the States a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the State a perpetual danger of embarrassment and possible annihilation. The Constitution contemplates no such shackles upon State powers, and by implication forbids them."

Even the Government, in its brief (pp. 33, 34), seems to admit that if the classification of this law is based solely on a State franchise it is invalid: "The importance of the difference proceeds, not from the presence or absence of franchises, but from the wide and important diversity of legal rules affecting the two kinds of business."

In *Railroad Co.* v. *Peniston* (18 Wall. 5, 35), *Mr. Justice* STRONG in discussing *McCulloch* v. *Maryland* uses the words: "The tax, therefore, was not upon any property of the bank, but upon one of its operations, in fact, *upon its right to exist as created.*" And just below, in discussing *Osborn* v. *U.S. Bank* he says: "the tax held unconstitutional was a tax upon the existence of the bank — upon its right to transact business within the State of Ohio."

In *United States* v. *Railroad Company* (17 Wall. 322, 332), *Mr. Justice* HUNT anticipates the doctrine of *South Carolina* v. *United States*, so much relied upon in the brief for the Government: "We admit the proposition of the counsel, that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an indi-

vidual could occupy with equal propriety." Thus early was the doctrine of that case distinguished.

And this franchise of being a corporation, although subject to separate taxation (*Horn Silver Mining Company* v. *New York*, 143 U.S. 305), can only be taxed by the State creating it or by another State as a preliminary to doing business therein; but not even then if an interstate commerce corporation. Of such nature are all the taxes imposed in Delaware Railroad Tax case, (18 Wall. 208), and the other cases cited on pages 11, 12 of Messrs. Guthrie, Morawetz and Van Sinderen's brief for the Home Life Insurance Company in behalf of this contention of the Government.

Mr. Justice FIELD in *Pembina Mining Company* v. *Pennsylvania* (125 U.S. 181, 186), says: "We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her,"— implying that it would be if it were so.

Is there anything in the reasoning of *Mr. Justice* BRADLEY in *California* v. *Pacific R.R.* (127 U.S. 1, 40–41) which indicates that it is to be applied to the State Government taxing a Federal corporate franchise and not to the converse proposition? "Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. . . . It seems very clear that the State of California can neither take them away nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? . . . a franchise is a right, privilege or power of

public concern, which ought not to be exercised by private individuals at their mere will and pleasure. . . . Under our system their existence and disposal are under the control of the legislative department of the Government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. . . . No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

Much argument is made on the point that a tax on the income or traffic made under the franchise is different from a tax on the franchise, but this Court has decided otherwise. It is quite sufficient to cite two famous cases. In *Osborn* v. *Bank of the U.S.* (9 Wheaton, 738), where, by the way, Mr. Hammond for the appellants (p. 773) argued that "the mere creation of a corporation does not confer political power or political character," MARSHALL himself, after remarking (p. 860): "That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation" — which remark has a distinct bearing on the ultimate motive of this legislation — held that even a tax of a fixed sum upon each office of the Bank is a tax upon the franchise of the Bank, saying (p. 862): "This distinction, then, has no real existence. To tax its faculties, its trade, and occupation, is to tax the Bank itself? To destroy or preserve the one is to destroy or preserve the other." But on this point nothing can be added to the conclusive argu-

ment of Senator Cummins, quoted and italicized below: "I am unable to distinguish a tax upon the business of a corporation simply because it is a corporation from a tax upon the right of a corporation to do business." The Solicitor-General orally argued that the tax was not on the franchise, but on the business or use of the franchise; and so Mr. Guthrie, in his brief in favor of the law, *Hine* v. *Home Life Insurance Company* (p. 5), says: "The argument that a state, by authorizing individuals to form a corporation, can exempt them from the power of Congress to impose an excise tax upon their private business does not require serious consideration." We think it does. If this were "an excise tax upon their private business," we should have no objection to the law except that it does not give the equal protection of the law to all groups of persons engaged in such business. But in last analysis the Government's case rests on the proposition that it is an excise tax upon the public business of being a corporation, only disguised by the device of adding thereto "associations organized for profit and having a capital stock represented by shares."

In *Home Insurance Company* v. *New York* (134 U.S. 594) it was decided that a tax imposed by State statute upon the corporate franchise or business of all corporations incorporated under any law of the State or of any other State or country and doing business within the State, measured by the extent of the dividends of the corporation, is a tax upon the right or privilege to be a corporation, and is not a tax upon the privilege or franchise enjoyed by the company as a going concern; *Mr. Justice* FIELD holding (p. 599) that it was not a tax upon the capital stock of the corporation, but upon the corporate franchise, and he defines this as being "The right or privilege to be a corporation . . . by which several individuals may unite themselves under a common name and act as a single person, with a succession of mem-

bers, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State."

The opinion of Congress itself as to the nature of the tax, and the opinions of Senators learned in the law as to its constitutionality, may perhaps now be referred to. Senator CLAPP (*Congressional Record*, Vol. 44, p. 3877): "The President in his message transmitted to Congress a few days ago suggested the propriety of an excise tax on the privilege of being incorporated."

Senator NEWLANDS, quoting Senator ALDRICH and Senator WHITE (*Congressional Record*, Vol. 44, p. 3758):

"Mr. ALDRICH: 'Mr. President, does the Senator from California mean to be understood as saying that the Government of the United States has ever taxed corporations as corporations at any time in its history?'

"Mr. WHITE: 'I mean to say that in the revenue law enacted during the war, Congress taxed corporations organized in the various States, and I shall in a moment turn to the section to which I allude. . . .'

"Mr. ALDRICH: 'I was not calling the Senator's attention to the transportation tax, but to that part of the amendments of the majority of the committee which proposes to tax corporations as corporations, as distinctive entities, without regard to whether they are engaged in one kind of occupation, industry, or business, or another.'

"Mr. WHITE: 'I am discussing all the provisions of the bill regarding the taxation of corporations. I say, and the Senator from Rhode Island will not deny it, that during the war we taxed corporations a percentage largely in advance of that proposed in this bill upon their gross receipts.'

"Mr. ALDRICH: 'We undoubtedly taxed certain industries, occupations and employments; and if corporations were engaged

in those industries, occupations or employments, they paid their taxes as individuals paid them. But this is the first attempt in the history of the Government to tax corporations as corporations.'"

By Senator CUMMINS (*Congressional Record*, Vol. 44, p. 3978): "I do not believe that there is any decision of the Supreme Court that sustains the amendment. If so, it has never been brought to my attention, and my investigation has not been casual or superficial. I know that the President of the United States has been led to believe that this decision is the one which will enable the law to escape the condemnation of the Pollock case. I know it not only through his message delivered to Congress, but I know it in another way which I do not choose to pursue. . . .

"I would not be here insisting upon the unfairness of this amendment if it imposed a tax upon the incomes of all persons and corporations. I would not be here opposing it at least on this basis if it imposed a tax upon all persons, firms, corporations, and companies doing business in the United States, for then there would be some pretence of equality and fairness, some defence for laying the hand of the law upon business and extracting a part of its profits or income. . . .

"I believe it would be unconstitutional to impose an excise tax on the business only of individuals, because that would create the very same discrimination that is created here. When you levy an excise tax upon business or occupation, it must be levied upon these persons, whether they are natural or artificial, who carry on that business. . . .

"The Senator from Michigan suggests that it might be done as a matter of police regulation. Of course that leads me to another point. If this tax is intended not to create a revenue, but if it is intended for the purpose of supervising and regulating corporations, that is quite a different proposition. I should like

to know before we get through with this whether it proposed through this tax to impose supervisory regulations upon all the corporations of the United States, to determine when and how they shall issue capital stock, when and how they shall issue evidences of indebtedness, what their business shall be, and all other things that concern or pertain to the business of the country. . . .

" . . . there is in the message and in some suggestions since, just a faint premonition, I can feel it in my bones, that one of the things which will be relied upon to sustain this tax is that it will enable the General Government to reach out and seize for regulation and supervision every corporation that has been organized in the forty-six States of the Union. . . .

"This case (the McClain case), Senators, has no more bearing upon the amendment which is now proposed than has the Pollock case. It is simply a tax levied upon certain persons, firms, and companies carrying on a named business. To make this case pertinent, you must hold that the business which is taxed under this law is the business of being a corporation. That is the only uniform thing in the classification, the business of being a corporation; and when you attempt to tax the business of being a corporation you are taxing the franchise, or the right to exist, and your law is not worth the paper upon which it is written."

Senator Cummins repeats this view in debate July 2, 1909 (*Congressional Record*, Vol. 44, p. 4040):

" . . . I would hold that it is a tax upon the franchise of the corporations, that it is a tax upon the business of the corporations, simply because they are corporations, and *I am unable to distinguish a tax upon the business of a corporation simply because it is a corporation from a tax upon the right of the corporation to do business. It may be that there are minds here so keen and penetrating as to discern some difference between these two*

things, but I cannot. I grant that Congress has the power to levy a tax on any business, upon any occupation. I grant it has the power to levy a tax upon any profession. But it has been the habit, heretofore, when Congress wanted to levy a tax on business, to specify the business upon which the tax was to be laid. It has been supposed that the business thus selected and segregated from other kinds of business was a business that was peculiarly fit to be taxed as Congress might direct. But when you group all the business of the United States into one law, and simply say that there shall be a tax laid upon all the business, then if you add to that the statement that it is to be laid only on business done by corporations of the country, you have in effect not levied a tax upon business or upon the carrying on of business, but you have levied a tax upon a corporation, upon the right, the privilege of a corporation to do business at all. That would be my interpretation of this statute."

Other leading Senators, eminent in the legal profession, took a similar view, and eleven pages of the *Congressional Record* (Vol. 44, pp. 4052 to 4063) are devoted to protests against the measure, which finally passed only by a vote of forty-five out of a total of ninety-two; less than a majority. Sixteen Senators never voted.

II.

This leads us to the larger question to which we are directed by the message of the President recommending the tax and by the Journals of Congress: the natural consequences of this scheme of legislation.

The President's message of June 16, 1909 (*Congressional Record*, Vol. 44, p. 3344), in which the law in question had its absolute inception, begins by approving the graduated inheritance tax, which was already a part of the House bill. This later was abandoned. It next goes on to advise against an income tax, except after a constitutional amendment. This advice was followed. Thirdly (marked "*second*" in the message), it recommends an excise tax of two per cent on all corporations and joint stock companies, except national banks (otherwise taxed), savings banks and building and loan associations, described as "*an excise tax upon the privilege of doing business as an artificial entity.*" This is in substance the present law, except that the amount of the tax was reduced to one per cent and the law extended to include associations "having a capital stock represented by shares, and every insurance company." Then the President's message closes as follows: "Another merit of this tax is the federal supervision which must be exercised in order to make the law effective over the annual accounts and business transactions of all corporations. While the faculty of assuming a corporate form has been of the utmost utility in the business world, it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty. If now, by a perfectly legitimate and effective system of taxation, we are incidentally able to possess the Government and the stockholders and the public of the knowledge of the real business transactions and the gains and

profits of every corporation in the country, we have made a long step toward that supervisory control of corporations which may prevent a further abuse of power."

Under the "Additional Regulations of the United States Treasury Department Relative to the Federal Corporation Tax Returns" promulgated November 25, 1910, by the Secretary of the Treasury, and approved on the same day by the President, we are informed that "Companies organized in Porto Rico and not engaged in business in the United States not subject to tax" (par. 21).

That under an opinion of the Attorney-General, "Limited partnerships, if organized for profit and having a capital stock represented by shares, although no 'certificates of stock' are issued, are liable to the tax imposed" (par. 29).

"Receipts during year from lands sold on installment to be included in gross income for that year" (par. 41).

That under the opinion of the Attorney-General, "As the tax imposed is measured by and is not a tax upon the net receipts of corporations, etc., interest received during the year on Government bonds is not proper deduction from such income in determining the amount of tax due" (par. 67).

That "Depreciation in value of mines by the removal of ore, if not otherwise ascertainable, may be prorated as in the case of sales of capital assets" (par. 72) (which seems irreconcilable with paragraph 41 above).

That under the opinion of the Attorney-General, promulgated April 4, 1910: "It appears that there are in Massachusetts, and perhaps elsewhere, various organizations known as 'associates,' 'trusts,' or 'real estate trusts,' which are not organized under a charter but are formed by an agreement and declaration of trust. It appears that the title to the property or business owned or operated by these organizations is vested in one or more trustees,

and certificates are issued to parties in interest as are shares of stock of incorporated concerns, the certificates being traded in as are shares of stock and the trustees being elected and their successors chosen as are directors in any corporation regularly chartered. The organization is one for profit and it possesses all of the essential elements of any joint stock company.

"In reply to a request from the Secretary of the Treasury as to the status of these organizations, in regard to the corporation excise-tax provisions of the tariff act of August 5, 1909, the honorable Attorney-General advises that these concerns are joint stock companies or associations organized for profit and having a capital stock represented by shares and are amenable to the provisions of the corporation excise-tax law."

That under an order of the Secretary of the Treasury, promulgated November 25, 1910, and approved by the President on the same day:

"3. The returns of the following corporations shall be open to the inspection of any person upon written application to the Secretary of the Treasury, which application shall set forth briefly and succinctly all facts necessary to enable the Secretary to act upon the request:

"(*a.*) The returns of all companies whose stock is listed upon any duly organized and recognized stock exchange within the United States, for the purpose of having its shares dealt in by the public generally.

"(*b.*) All corporations whose stock is advertised in the press or offered to the public by the corporation itself for sale. In case of doubt as to whether any company falls within the classification above, the person desiring to see such return should make application, supported by advertisements, prospectus, or such other evidence as he may deem proper to establish the fact

that the stock of such corporation is offered for general public sale.

"Returns can be seen only in the office of the Commissioner of Internal Revenue, in Washington, D.C. In no case shall any collector, or any other internal revenue officer outside of the Treasury Department in Washington, permit to be seen any return or furnish any information whatsoever relative to any return or any information secured by him in his official capacity relating to such return.

"No provision is made in the law for furnishing a copy of any return to any person, and no copy of any return will be furnished except to the corporation making the return, or its duly constituted attorney."

The working of the law is excellently shown by the above extracts.

Its actual result in its first year (as shown in the annual report of the United States Commissioner of Internal Revenue) was to collect a tax upon a net income of $3,125,481,101 on a capital stock of $52,371,626,752 from 262,490 corporations, having a total interest-bearing debt of $21,383,952,696. 29,812 of these were "financial" corporations with a capital stock of $2,723,954,639, a debt of $2,404,299,252, and a net income of $394,747,699. 24,252 were public service corporations with a capital stock of $18,902,060,130, debt $17,472,398,675, and net income of $808,960,581; the balance, or 207,826 corporations, were apparently ordinary industrial and mercantile business corporations or associations.

Now this total net income amounts to nearly $40 per capita of the continental population of the United States; or, counting five to a family, $200 per year for every American family is shown to be the net revenue of corporations affected by this act accruing to their stockholders; which, according to the census returns, is

about forty per cent of the entire earnings of the average family, the latter being only, as a rule, about $500 a year. The enormous importance of this legislation is thus shown. These earnings are ultimately nearly all distributed among the individual persons of the United States; even if passed through holding companies or insurance companies the people become the ultimate beneficiaries. The effect of the law, therefore, is to place that proportion of the total business or earnings of the country, not only under the direct taxing power of the Federal Government, but into its power to control, regulate, and finally to destroy or remove from State jurisdiction. That the provisions for publicity (3 (*a*) above) are most excellent, and correspond to the most enlightened modern thought, does not alter their unconstitutionality as applied to any but corporations doing an interstate commerce business, or enjoying a Federal charter.

The power to charter incorporations, the privilege of doing business under a corporate form, was never lightly regarded. It is an important flower of sovereignty; also the necessary right of the individual to-day, whether he earn his bread by his own trade or labor, or depend on the income of invested property.

"Over no subject is it more important for the interests and welfare of a State that it should have control than over corporations doing business within its limits. By the decision now rendered, congressional legislation can take this control from the State, and even thrust within its borders corporations of other States in no way responsible to it." *Mr. Justice* FIELD in the *Pensacola Tel. Co.* v. *West, etc., Tel. Co.* (96 U.S. 1, pp. 23, 24).

It is true that these words are in a dissenting opinion, but the majority only differed in that they held that this argument did not apply to a corporation engaged in interstate commerce. And so, under this present law, both the State's power to tax, and,

more important yet, the State's police power as well as the jurisdiction of its courts may fall before the Federal power. *Mr. Justice* FIELD'S words in *Paul* v. *Virginia* (8 Wall. 168 at pp. 181, 182) will cease to be true:

"Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this Court in *Bank of Augusta* v. *Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even, by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporations entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

"If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States.

At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

"If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal."

Substitute the words "federal corporation" for "incorporation of another State" and the whole argument is applicable here.

It is, of course, no answer to say that the Congress may relegate to the States the power to tax such Federal corporations, may subject them to the jurisdiction of their courts, and may even put them under their entire police power; we have no right to assume that they will do so, nor, obviously, is the case so in fact: for they are *already* being taxed by the Federal Government, and the official documents above quoted clearly show that it is *already* the intent of the law, by a system of publicity, uniformity of accounts and prescribed regulations, to subject all State corporations to a Federal standard.

We submit that, except in the case of interstate commerce corporations, this cannot be done.

III.

The argument that the tax is, after all, an income tax imposed on corporations and associations, whatever Congress intended, and invalid as such, referred to in our original brief, has been ably covered in the briefs filed in the other cases; notably that in (old) No. 767, *Jared* v. *American Multigraph Co.*, and in the brief supporting the contention of the Government that the law is constitutional, filed in (old) No. 752, *Hine* v. *Home Life Insurance Company*. If some other ground of the classification be sought to justify the law than that of an excise on a corporate charter or an income tax levied only on certain kinds of corporations, we again submit that it can only be on the mere quality of divisibility. It is urged by the Government that there is something taxable in the assignability of shares, but the common law recognizes co-ownership and part ownership; indeed, in many cases creates it; such shares are constitutionally assignable, and it is certainly not due process of law directly or indirectly to tax the owner of two parts more than the owner of the whole.

"Where there is want of constitutional power to tax a particular object neither a direct nor an indirect tax can be imposed, since the power to tax is the power to destroy." *Mr. Justice* WHITE in *Snyder* v. *Bettman* (190 U.S. 249, 259).

We repeat that no argument can be based on a classification that a property or business is assignable, for all property is assignable; nor on that that it is assignable in shares or fractions. Yet the ruling of the Government cited above that "Limited partnerships, if organized for profit and having a capital stock represented by shares, although no 'certificates of stock' are issued, are liable to the tax imposed," shows that the law reaches even to that extent.

IV.

The question of the power of this Court, on the complaint o a private citizen, to examine into the records of Congress for the purpose of ascertaining whether the corporation tax provision o the tariff act (Section 38) originated in the House of Representa tives, pursuant to Article I., Section 7, Clause 1 of the Federa Constitution, has been hitherto expressly left undecided by this Court (*Twin City National Bank* v. *Nebeker*, 167 U.S. 196 203). And this position seems to have been reaffirmed in the recent case of *Millard* v. *Roberts* (202 U.S. 429 at p. 438).

It is urged by the Government in its supplementary brief filed after the previous argument of these cases, that the Senate has from the earliest times exercised its power of freely amending revenue bills in this manner, *i.e.*, by striking out certain pro visions in a bill as submitted to it by the House and by substi tuting wholly new provisions in their place. But that the exercise of this power has hitherto been unquestioned by any private citizen, furnishes no valid reason why the question of the exist ence of the power in the Senate under the Federal Constitution should not now be decided by the Court on the petition of a private citizen. The failure of others to object in times past cannot operate as a forfeiture of the present right of these com plainants to object and have the question decided by the Court, if it appears that an express provision of the Constitution may have been violated.

It is obvious from an examination of English Parliamentary history that Article I., Section 7, Clause 1 of the Federal Consti tution was inserted therein to make certain the right of that branch of Congress *nearest the people* to institute legislation which would in its operation increase the financial burdens of the citizens, a right which had not been wholly conceded to the English House

of Commons, and the denial of which by the House of Lords had been the source of much complaint; and that the founders of this Government, having before them the lessons of English history in this respect, intended that the House of Representatives should exercise this right in its broadest sense, and be free from the necessity of enacting, by way of compromise or otherwise, any revenue legislation originating in the Senate — the very necessity which arose in the passage of this corporation tax provision by the House of Representatives.

If the contention of the Government is sound, viz.: that the corporation tax provisions of the tariff act did, in fact, originate in the House of Representatives, then for the future no limit can logically be set to the right of the Senate to originate revenue legislation, using the same means as were used by the Senate in securing the passage of this corporation tax; and the limited constitutional right of the Senate to amend revenue bills or to concur in their passage by the House of Representatives becomes at once the far more extensive right to *originate and substitute* wholly new revenue bills which, if subsequently accepted by the House of Representatives, become law, notwithstanding the fact that these bills did not have their origin in the House of Representatives, as provided by the Constitution.

We believe that Article I., Section 5, Clause 3 of the Federal Constitution, requiring each House of Congress to keep a journal of its proceedings, was inserted to insure the passage of laws in a manner conformable to all constitutional requirements. Thus, we venture to add hereto various extracts from both Senate and House records on the subject of the corporation tax.

This corporation tax provision first appears as an "amendment" to the tariff bill sent to the Senate by the House of Representatives for concurrence (H.R. 1438) and was reported by Mr.

Aldrich for the Committee on Finance (*Congressional Record*, Vol. 44, p. 3836). Now this is a new section, "Section 4:" "That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company shall . . ." etc. That this was an entirely new matter appears in several places. (*Congressional Record*, Vol. 44, p. 3877), Mr. Clapp:

"The President in his message transmitted to Congress a few days ago the propriety of an excise tax on the privilege of being incorporated." The Senate insisted on its corporation tax amendment and sent it to conference without waiting for disagreement by the House.

Mr. Aldrich and Mr. Bailey (*Congressional Record*, Vol. 44, p. 4316):

"Mr. ALDRICH: 'I move that the Senate insist upon its amendments to the bill and ask for a conference with the House of Representatives upon the bill and amendments.'

"Mr. BAILEY: 'I submit that the question is not in order, because the House has not yet disagreed to the amendments, and we should at least show the House the courtesy of allowing it to express itself before we insist upon our amendments.'" (See also Senator Flint's argument, Vol. 44, pp. 3936).

To illustrate the feeling of certain members of the House of Representatives on the legality of the origin of this corporation tax provision, we quote Mr. Payne, whose name the tariff act (H.R. 1438) bears:

"Mr. Speaker, when the fathers put into the Constitution the provision that bills raising revenue must originate in this House, I think they meant something more than the latter day interpretation has put upon that part of the Constitution. I think they intended germane amendments. I do not believe it entered into their ideas that the House should simply prevent all legislation

being enacted, raising revenue, without they sent in a bill of some kind; but they meant that when the House sent in a bill relating to specific objects the Senate should have the right to amend it in reference to those objects" (*Congressional Record*, Vol. 44, p. 4384 .

We may add in conclusion that it is matter of common political knowledge that the House of Representatives never had any opportunity to vote separately upon the corporation tax provision of the tariff act, being obliged to accept this substitution by the Senate in order to secure the passage of the remainder of the tariff bill.

JOHN G. JOHNSON. FREDERIC JESUP STIMSON.

LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
J. GRANT FORBES,
Of Counsel.

Supreme Court of the United States.

No. 425. October Term, 1910.

Joseph E. Gay, *Appellant*,

v.

The Baltic Mining Company *et al.*

SUPPLEMENTAL BRIEF OF THE APPELLANT, JOSEPH E. GAY.

IN REPLY.

As the Government, in its original brief (pp. 37, 38 *et seq.*), seeks to maintain the constitutionality of the tax in so far as it is a tax upon associations or stock companies "having a capital represented by shares" and for that contention relies principally on decisions of the Supreme Court of Massachusetts which have upheld a state franchise tax on the franchises of corporations created by the State,

> *Portland Bank* v. *Apthorp*, 12 Mass. 252.
> *Connecticut Mutual Life Insurance Co.* v. *Commonwealth*, 133 Mass. 161, 162, 163.
> *Commonwealth* v. *Hamilton Manufacturing Co.*, 12 Allen, 298, 300–306.
> *Commonwealth* v. *People's Savings Bank*, 5 Allen, 428.

The same has been held as to a foreign corporation in a case not yet reported, —

> *Commonwealth* v. *Baltic Mining Co.* (Supreme Court of Massachusetts, January, 1911).

This appellant, while fully admitting such power of taxation in the State which creates the corporation, or over the corporation of another State which it admits to the privileges of its laws and the advantages of its markets, as shown in the above cases, reiterates his contention that the law cannot be sustained as a tax upon the mere right to do business with "a capital stock represented by shares." And this is expressly decided in certain cases not cited in the Government's brief, but which discussed and distinguish *Portland Bank* v. *Apthorp, supra,* and the other cases therein cited on this point, and to these later cases he now prays leave to invite the attention of this Honorable Court, and particularly in support of the third paragraph of his supplementary brief and the fourth paragraph of his original brief that the mere quality of divisibility is not constitutionally taxable.

Gleason v. *McKay,* 134 Mass. 419.

This case was brought to determine the constitutionality of a statute of Massachusetts imposing a tax upon the shares of such associations, not corporations, having stock represented by assignable shares. (Mass. Statutes 1878, c. 275.) This statute, it is especially significant to note, was an amendment or addition to the original statute (Mass. Statutes 1865, c. 283), which merely provided for such a tax upon the shares of *cor-*

porations chartered by the Commonwealth of Massachusetts. Section 1 reads as follows: —

> "Chapter two hundred and eighty-three of the acts of the year one thousand eight hundred and sixty-five, and the acts in amendment thereof, are hereby extended to apply, so far as applicable, to companies, copartnerships and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer. And the tax provided for in said chapter two hundred and eighty-three shall be paid by such company, copartnership or association upon the aggregate value of the shares of said capital stock, in the manner provided in said chapter for taxes upon corporations."

In a unanimous decision the Court, by MORTON, *C.J.*, held the statute unconstitutional:

> "The Legislature is given the power 'to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth,' and also power 'to impose, and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same.' Const. Mass., c. 1, art. 4.
>
> "It is clear that the statute in question was not intended to lay a tax upon property within the first of these clauses. It does not purport to do this.

It merely extends to certain copartnerships and associations the provisions of the St. of 1865, c. 283, which chapter has been held to levy an excise upon corporate franchises, and not to lay a tax on property, and which chapter can be sustained as constitutional only upon the ground that it levies an excise. . . .

"It will not be seriously contended that the privileges or rights which are taxed by this statute can be properly described as either produce, goods, wares or merchandise. Do they fairly come within the term 'commodities,' in the sense in which it is used in the Constitution? Ever since the adoption of the Constitution, the Legislature in its practice, and this court in its adjudications, have given a very broad and extensive meaning to this term. It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities, and subject to an excise. So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this Commonwealth. So where the Legislature has thought, upon considerations of public policy, that certain occupations or callings, of a public or *quasi* public character, should be carried on under governmental regulation, it has been usual to impose a reasonable fee for a license.

Portland Bank v. *Apthorp*, 12 Mass. 252.
Commonwealth v. *People's Five Cents Savings Bank*, 5 Allen, 428.
Commonwealth v. *Hamilton Manufacturing Co.*, 12 Allen, 298.

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Commonwealth v. *Cary Improvement Co.*, 98 Mass. 19.
Connecticut Ins. Co. v. *Commonwealth*, 133 Mass. 161.

"This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission.

"The defendant in this case is not a corporation. It is merely a partnership, with all the incidents and responsibilities of a partnership. The firm property is taxable at its business domicil. *Hoadley* v. *County Commissioners*, 105 Mass. 519. It enjoys no franchises conferred upon it by the Legislature. It does not ask for or enjoy any corporate or special privileges. It has constituted its partnership under its common law rights and such legal agreements as it chooses to make. The peculiar feature that the interest of each member may be transferred without the special assent of the other members, is created by agreement of the partners under their natural rights at common law. We do not see how this peculiar feature can be called a commodity, subject to a special excise, any more than the agreement of copartnership itself, or any clause or part of it, or any other agreement, right or mode of transacting any business, can be called a commodity, and so liable to taxation at the will of the Legislature.

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"If this tax can be upheld, it seems to us that the necessary result will be that the Legislature has the power to select any business, occupation or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word 'commodities' beyond any reasonable limits. Its effect would be to break down the limitations which the Constitution intended to impose upon the power of the Legislature, for the purpose of securing the end that all sums necessary for the defence and support of the government should as far as practicable be raised by the equal taxation of the people."

O'Keefe v. *Somerville*, 190 Mass. 110.

In this case, decided in 1906, and citing *Gleason* v. *McKay*, the same Court in a unanimous opinion held that a Massachusetts Act of 1904, attempting to impose an excise tax on the business of selling or giving trading stamps or similar devices in connection with the sale of articles, is unconstitutional and void, the right to transact business in this manner not being a commodity within the meaning of the word "commodities" in Const. Mass. c. 1, sec. 1, art. 4. While recognizing the constitutionality of succession taxes, and discussing fully the case principally relied on in the Government brief, of *Portland Bank* v. *Apthorp* (12 Mass. 252), the Court went on to say (pp. 112, 114), —

"It is not necessary in the present case to determine the meaning of the word 'commodities,' in reference to every possible application of it, but we

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are of opinion that it is not broad enough to include every occupation which one may follow, in the exercise of a natural right, without aid from the government, and without affecting the rights or interests of others in such a way as properly to call for governmental regulation. Whatever may be done by the Congress of the United States under its general power to levy excise taxes (See *Thomas* v. *United States*, 192 U.S. 363.) we are of opinion that, under the limitation to commodities, the General Court of Massachusetts cannot levy an excise tax upon the business of a husbandman or an ordinary mechanic. . . ."

"Taking the acts referred to in the broad terms of the description in the statute, they are not dependent for their legality upon the legislative will, nor do they call for legislative regulation. They are performed in the exercise of a natural right, and are not in any sense rights or privileges conferred by law."

The case of *Gleason* v. *McKay* was under discussion and was affirmed (although that was not necessary to the decision) in —

Minot v. *Winthrop*, 162 Mass. 113, —

which was a case of a tax upon collateral legacies and successions.

And FIELD, *C.J.*, citing the case of *Gleason* v. *McKay*, says, (p. 121), —

"The defendant was a partnership, the peculiar feature of which was that by agreement between the partners the interest of each might be trans-

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ferred in much the same manner as stock in an incorporated company. This peculiar feature was held not to be a commodity within the meaning of the Constitution."

Could a more exact vindication than this be found of the position taken by counsel for the appellant in *Flint* v. *Stone Tracy Company?*

Now both *Minot* v. *Winthrop* and *Gleason* v. *McKay* were carefully reviewed in —

Opinion of the Justices, 196 Mass. 603.

While three of the Justices in this case doubted whether *Gleason* v. *McKay* could be supported on the mere ground that an unincorporated association exercises no special privilege granted by the Legislature (196 Mass. 615), they quote with approval the words of the Court in *Minot* v. *Winthrop:*

> "It is to be noticed that the tax intended to be imposed was not upon a business or employment. The statute in terms applied only to certain kinds of partnership, leaving other partnerships and persons doing the same kinds of business untaxed, and the partnerships taxed possessed no special privileges derived from the Legislature. In *Portland Bank* v. *Apthorp* [12 Mass. 252], it was said of excises: 'Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed.' As the tax considered in *Gleason* v. *McKay* was not upon a business or employment, and as there was no franchise or privilege conferred by the Legis-

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lature, the distinction between partnerships with transferable shares and those without rendered the tax unequal and unreasonable, because it was a discrimination founded upon an immaterial fact."

The other four justices in the opinion (*ubi supra*) definitely reaffirmed both *Gleason* v. *McKay* and *O'Keefe* v. *Somerville*. Thus, *Mr. Justice* RUGG (196 Mass. 620):

> "The proposed legislation levies a stamp excise tax upon all contracts of a certain class. It is imposed only upon the paper or writing, which is the evidence of the rights of the holder and is essential to their enforcement. It is not an excise upon the existence of the association or upon its holding of property. Such an excise would be unconstitutional under *Gleason* v. *McKay*, 134 Mass. 419."

And the other three justices, including KNOWLTON, *C.J.*, after an exhaustive review of the statutes on English taxation and early taxation in Massachusetts, by which it appears that, at least negatively, no such tax was ever imposed, say:

> "But none of these statutes implies that an excise tax may be laid upon a company, association, or partnership engaged in a simple business, like husbandry, merely because the members agree among themselves that their ownership shall be represented by transferable certificates of shares."

Unless, therefore, the appellees are prepared to maintain that the Federal Government is given wider and other powers of taxation by the Constitution, despite the Fifth Amendment, than are given to the Common-

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wealth by the practically unlimited provisions for taxation in the Constitution of Massachusetts[1], the decisions of the Supreme Court of Massachusetts are decisive of the point that the "commodity" of having a capital stock represented by assignable shares is not taxable.

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[1] The Articles of the Mass. Const. are as follows (Part First, Article IV): —

"The people of this Commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled."

And (Part Two, c. 1, sec. 1, Article IV): —

"And further, full power and authority are hereby given and granted to the said general court . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same;"

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 775.

JOSEPH E. GAY, APPELLANT,

v.

THE BALTIC MINING COMPANY ET AL., APPELLEES.

BRIEF FOR APPELLEES.

We appear for the Baltic Mining Company and its officers and directors, in support of the constitutionality of the Corporation Tax law. While it is apparent that the financial interest of this company, like that of other corporations, is to escape the burdens of taxation, yet, the Board of Directors of this Company (Record, p. 7) "Voted to instruct the officers of the Company to file the returns with the Collector of Internal Revenue, and also to pay the tax, as required by law". Mr. William A. Paine, the President of the Company, replied to the demand made by the objecting stockholder (Record, p. 7), that "as the law stands, the Directors do not feel there is any other course open to them". In a like situation, the eminent counsel for one of the corporation defendants in the Income Tax cases, in his introductory statement said: "I am glad that there is at least one great corporation subjected to the tax, which avows its readiness to submit itself without controversy or

contention to the law of the country, and to discharge the burdens which that law imposes upon it".

Mr. James C. Carter in *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429, 514.

The provisions of the Federal Constitution, referring to taxation, are as follows:

"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers."

Article 1, Sec. 2, Clause 3.

"The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Art. 1, Sec. 8, Clause 1.

The migration or importation of persons by the states was not to be prohibited prior to 1808, but a tax or duty might be imposed on such importation, not exceeding ten dollars for each person.

Art. 1, Sec. 9, Clause 1.

"No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Art. 1, Sec. 9, Clause 4.

"No tax or duty shall be laid on articles exported from any state."

Art. 1, Sec. 9, Clause 5.

"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports,

except what may be absolutely necessary for executing its inspection laws."

Art. 1, Sec. 10, Clause 2.

"No state shall, without the consent of congress, lay any duty of tonnage."

Article 1, Sec. 10, Clause 3.

The above provisions contain the entire grant of the taxing power by the organic law, with the limitations which that instrument imposes.

Pacific Insurance Co. v. *Soule*, 7 Wall. 433, 444.

The two classes mentioned in these provisions, namely, "taxes", on the one hand, and "duties, imposts and excises," on the other hand, embrace all forms of taxation contemplated by the Constitution. Indeed, they apparently cover the whole field of taxation, for other forms of taxation, if any exist, which are not embraced within these terms, still remain undiscovered.

Thomas v. *United States*, 192 U. S. 363, 370.
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 557.

The taxing power is thus granted in the most comprehensive terms. The only limitations imposed upon Congress are: That direct taxes, including capitation taxes, shall be apportioned; that duties, imposts and excises shall be uniform throughout the United States; and that no taxes or duties shall be imposed on exports from any State.

"With these exceptions, the exercise of the power is, in all respects, unfettered", unless in a case where conflict is shown with the due process clause of the Fifth Amendment.

Pacific Insurance Co. v. *Soule*, 7 Wall. 433, 446.

"The taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument."

McCray v. *United States*, 195 U. S. 27, 59.

The real issue here involved is whether this Corporation Tax is an "excise", within the meaning of the Constitution. If an "excise", it is valid, unless it conflicts with the rule as to uniformity. If not an "excise", it matters not what else it may be; it cannot here be sustained. The real issue, therefore, involves no definition or discrimination between "direct" taxes and "indirect" taxes, for the latter term is not used in the Constitution. Nor is the issue whether this is a "direct tax" or an "excise", for this form of question erroneously assumes that direct taxes and excises cover the whole domain of taxation, whereas the Constitution also mentions "duties" and "imposts". The proper statement of the real issue is: — Does this law impose an "excise"?

The exact terms of the Corporation Tax law show plainly the intent to impose an "excise", of the same general character as many "excises" which have heretofore been sustained by this Court. The Act, upon its face, shows how radically distinct it is from the law considered in the Income Tax cases.

The Corporation Tax law (Section 38 of the Act of August 5, 1909) provides: "That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year"; exempting, however, from the operation of the act "labor, agricultural or horticultural organizations"; "fraternal beneficiary societies, orders, or associations operating under the lodge system"; "domestic building and loan associations"; and "any corporation or association organized and operated

exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual".

I.

THE CORPORATION TAX LAW IS AN "EXCISE", WITHIN THE MEANING OF THE FEDERAL CONSTITUTION.

Is this Corporation Tax an "excise", within the meaning of that term, as used in the Federal Constitution, and as applied in the numerous decisions of this Court with respect to "excises"? If it is an "excise", the distinctions between all these different suits now before the Court at once disappear, for they rest simply upon the fact that different kinds or classes of property or income are held by the several corporations. In the case of an "excise", it becomes immaterial what kind or class of property is held by the corporation, whether realty, mines, United States bonds, municipal bonds, tax exempt securities, or other classes of property, or, indeed, whether the corporation has any property at all, for an "excise" is not, in any sense, a tax upon "property". Distinctions with respect to the kind of property owned have no material bearing, excepting only in the case of "direct" taxes; and even there, under the Income Tax decisions (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601), it would seem that the kind or class of property possessed cannot be a material factor in the case, for if a tax is not an "excise", but a "direct tax", it is not affected by the consideration whether the property be real or personal, or whether it be the income thereof. All kinds of property and all classes of income derived from property are treated alike. Taxes upon property, real or personal, or upon the income of property, real or personal, are "direct taxes", and cannot be levied except under the rule of apportionment among the States, according to population. We concede that a mine is property of a

peculiar nature: and that the fruits and products of land, whether vegetable, animal or mineral, until severed, are as much realty as the land itself or the rentals thereof.

Caldwell v. *Fulton*, 31 Pa. St. 475, 483.
Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S., 601, 692.
Co. Lit. 4 a, 4 b.
2 Bl. Com. 18.

But the peculiar nature of the property is here an inconsequential factor, if the tax is an "excise". If the law imposes a "direct tax", obviously it is invalid because not apportioned, according to population.

It is unnecessary here to attempt a complete and adequate definition of the term "excise". It suffices, for the purposes of this case, to determine that this tax represents one form of "excise", and properly comes under that term, as used in the Constitution. All attempts to make a complete and adequate definition of the term "excise" have hitherto failed.

See *Patton* v. *Brady*, 184 U. S. 608, 617, 618.
Pacific Insurance Co. v. *Soule*, 7 Wall. 433, 445.
1 Blackstone Comm. p. 318.
Story Const., Sec. 953.
Cooley, Taxation, p. 3.
Andrews Rev. Law, Section 133.
Bateman's Excise Law, 96.
Oxford Dictionary (Murray), under "Excise".

All these attempted definitions are incomplete and inadequate, in that they all leave out well recognized classes of "excises", such as those on corporate franchises, particular business transactions, successions, vocations, occupations, professions, privileges and the like, many of which classes, from the foundation of this Government, have been regarded as "excises".

As was said by Chief Justice Fuller in *Thomas* v. *United*

States, 192 U. S. 363, 370, "There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like".

Under the Rule of Stare Decisis, the Corporation Tax Must be Held to be an "Excise". Otherwise, Numerous Decisions Holding Identical or Analogous Taxes to be "Excises" Must be Overruled.

Upon examination of the decisions of this Court, involving analogous taxes, and even substantially identical taxes, it becomes clear that this Corporation Tax must be held to be an "excise", unless a considerable number of decisions of this Court are to be regarded as overruled.

Thus, in *Pacific Insurance Company* v. *Soule* (7 Wall. 433), the Civil War tax upon insurance companies was held to be an "excise", and not a direct tax. The statute there involved (Sections 105 and 120 of the Internal Revenue Act of June 30, 1864, as amended by the Act of July 13, 1866) imposed a tax upon the "amounts insured, renewed, or continued by insurance companies; upon the gross amount of premiums received and assessments by them"; and a tax also upon "dividends, undistributed sums, and income". If a tax so expressed properly constituted an "excise", as was there held, we submit that the present act, which specifically calls the tax a "special excise tax"; which is expressed to be, not a tax directly levied "upon" dividends or income, but a tax "equivalent to" a certain percentage upon the "entire net income"; and which is still further designated as a special excise tax "with respect to the carrying on or doing business by such corporation", must still more clearly be held to be an "excise", rather

than a direct tax, unless the *Soule* case is to be regarded as overruled. There is no material difference in the language of the two acts, with respect to the standard whereby the amount of the tax is to be measured. In that case, the tax was upon the "gross amount of premiums received", and also upon "dividends, undistributed sums, and income". Here the tax was measured by the "entire net income". Mr. Justice Swayne there said (p. 446): "If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the *business* of an insurance company can be held to belong to that class of revenue charges. . . . To the question under consideration it must be answered, that the tax to which it relates is not a direct tax, but a duty or excise".

In the same case, the practical consequences of holding such corporation taxes to be direct taxes were thus forcibly stated (p. 446): "The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition".

But it has been argued that this and other analogous cases, hereinafter referred to, have been overruled by the Income Tax cases. (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601.) But there are wide differences between the Income Tax there under consideration, and the present Act. That Act covered individuals and firms as well as corporations. This law applies only to corpo-

rations, joint stock companies and associations organized for profit and having a capital stock represented by shares, and insurance companies. Here the tax is expressly levied "with respect to the carrying on or doing business by such corporation", that is, upon the corporate franchises, or upon the privilege of doing business in a corporate or *quasi* corporate form, or upon the business when carried on in a specified way, or under certain forms, differing from all other methods or forms of doing business, whether conducted by firms or individuals. Here also, while this is not conclusive, it is at least worthy of remark that this tax is designated, in the Act itself, as a "special excise tax".

In the Income Tax cases (157 U. S. 429; 158 U. S. 601) four matters were decided by the Court:

First: That a tax upon real estate is a direct tax.

Second: That a tax upon personalty is likewise a direct tax, as no sound distinction exists between a tax levied upon a person, solely because of his general ownership of real estate, and a tax so levied, solely because of his general ownership of personal property.

Third: That a tax upon the income derived from property, whether real or personal, is the legal equivalent of a direct tax upon the property from which such income is derived, and is, therefore, a direct tax, and must be apportioned.

Fourth: That while the Income Tax law covered also all other sources of income, like professional incomes, not derived from property or investments, such other classes of income were so inextricably blended, under the terms of the Act, with income derived from property that the whole Act formed one indivisible scheme of taxation; that it could not, for a moment, be supposed that Congress would have taxed such other forms of income, if it had understood that the tax on incomes from real and personal property would

be held to be invalid, and therefore that the whole Act must be deemed to be invalid.

See *Knowlton* v. *Moore*, 178 U. S. 41, 82.

In the opinion in the Income Tax cases, the Court indicated no intention of overruling the *Soule* case and other similar cases. On the contrary, the Court upheld the validity of these decisions, distinguishing them, and stating (157 U. S. 576) that in the *Soule* case "the decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done. This was in accordance with *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611, and *Hamilton Company* v. *Massachusetts*, 6 Wall. 632".

In *Knowlton* v. *Moore* (178 U. S. 41), Mr. Justice White (p. 82), stating the effect of the decision in the Income Tax cases, said: "These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

In *Railroad Co.* v. *Collector* (100 U. S. 595), the Civil War tax was upheld as an "excise" on the business of the class of corporations mentioned in the act, which provided that railroad, canal, turnpike and certain similar classes of corporations, which should issue bonds upon which interest was to be paid, or should declare dividends payable to its

stockholders as part of the "earnings, profits, income, or gains of such company", and "all profits of such company carried to the account of any fund, or used for construction", should be subject to and pay a tax of five per cent on the "amount of all such interest or coupons, dividends or profits". This act was held to be constitutional, notwithstanding the further fact that the act authorized the tax to be collected directly from the corporation, authorizing it to withhold the amount of the tax from the dividends and coupons on which it was imposed, even though due to a foreign stockholder or bondholder, Mr. Justice Miller stating (p. 598): "The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. . . . The tax was not laid on the bondholder who received the interest, but on the earnings of the corporation which paid the interest . . . (p. 599). The tax is laid by Congress on the net earnings, which are the results of the business of the corporation, on which Congress had clearly a right to lay it".

This decision was followed in —

United States v. *Erie Railway Co.*, 106 U. S. 327.

It has never been questioned as law, but has been expressly approved in,—

Railroad Co. v. *United States*, 101 U. S. 543, 550.
Bailey v. *Railroad Co.*, 106 U. S. 109, 115.
Memphis & Charleston R. R. Co. v. *United States*, 108 U. S. 228, 234.
Little Miami, etc., R. R. Co. v. *United States*, 108 U. S. 277, 279.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, it was held that an act which provided that every National banking association, State bank, or State banking association should pay a

tax of ten per cent on "the amount of notes of any State bank, or State banking association, paid out by them" after a specified date, did not impose a direct tax. While the Court regarded this as a tax on bank circulation, rather than upon the franchise of the bank, the Court held it to be an "excise". Chief Justice Chase there said (p. 547): "But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property".

See also *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632, 638.

So, also, State statutes imposing taxes on savings banks, based on the aggregate amount of their deposits, and on manufacturing corporations, based upon the excess of the market value of their capital stock over and above the value of their real estate and machinery, have been upheld as "excises". In such cases, it is immaterial whether the deposits or capital are invested in United States bonds or other tax exempt securities, for the tax is not a property tax.

Society for Savings v. *Coite*, 6 Wall. 594.
Provident Institution v. *Massachusetts*, 6 Wall. 611.
Hamilton Co. v. *Massachusetts*, 6 Wall. 632.

See also,—

Portland Bank v. *Apthorp*, 12 Mass. 252, 256.
Van Allen v. *The Assessors*, 3 Wall. 573.
Home Insurance Co. v. *New York*, 134 U. S. 594.
Pullman Co. v. *Pennsylvania*, 141 U. S. 18.
State Tax on Railway Gross Receipts, 15 Wall. 284, 293.

It has been urged, however, that all these cases, involving Civil War taxes upon the business or earnings of corporations, have been swept away by the decision in the Income Tax cases (157 U. S. 429; 158 U. S. 601), because of the fact that a conclusion was there reached as to general income taxes upon individuals, based solely on the general ownership of property, which differed in its results from the decision arrived at with respect to the Civil War Income Tax. (*Springer* v. *United States*, 102 U. S. 586.)

Yet, even as to the *Springer* case, the Court in the Income Tax cases (157 U. S. 429, 578, 579) expressly distinguished that case, and refused to regard it as overruled, stating that a tax on the professional receipts of an attorney at law, as in the *Springer* case, might well be "treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct".

Whatever may be said as to the effect of the Income Tax decision in overruling the *Springer* case, it cannot be shown that the Court cast any doubt upon the correctness of the above decisions holding corporation taxes to be excises. Yet these and other analogous decisions must be regarded as overruled, if the present Act be held not to constitute an "excise" tax. That the Court, in the Income Tax cases, did not intend to intimate any doubt as to its previous decisions on corporation excise taxes, is clearly shown by the language of the opinion (158 U. S. 635), "We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such".

See also *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 413.

In *Knowlton* v. *Moore*, (178 U. S. 41), which held the succession tax imposed by the Act of 1898 to be an excise, following the earlier case of *Scholey* v. *Rew* (23 Wall. 331), a similar argument was addressed to the Court, to the effect that *Scholey* v. *Rew* had been overruled by the Income Tax cases. But the Court held otherwise, Mr. Justice White stating, (p. 81): "There was no intimation in the *Pollock* case that inheritance taxes — which had been held in *Scholey* v. *Rew* not to be direct, which had from all time been considered as being imposed not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property occasioned by death, and which had from the foundation of the government been treated as a duty or excise — were direct taxes within the meaning of the Constitution".

In *Plummer* v. *Coler*, (178 U. S. 115) it was held that the New York inheritance tax law was an "excise", and not a direct tax upon property, and therefore constitutional, irrespective of the fact that the property included in the estate of the deceased was composed, in whole or in part, of tax-exempt United States bonds. The Court stated (p. 137):

> "We are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents."

The exact similarity between succession or inheritance taxes and taxes upon corporate franchises, was so far recognized in that case that the Court admitted that they

must stand or fall together, as "excises", resting its decision largely upon the line of corporation tax cases above cited. In neither case, can the character of the property held by the estate of the deceased, or by the corporation, whether United States bonds, municipal bonds or other forms of property, be regarded as a material factor in the determination of the constitutionality of the tax, for the Court there states (p. 135) that if the proposition is sound, that the character of the property held may be taken into account, "then it must follow that the cases in which this court has held that, in assessing a tax upon corporate franchises, the amount of such a tax may be based upon the entire property or capital possessed by the corporation even when composed in whole or in part of United States bonds, must be overruled. . . . So that we return to the authorities, by which it has been established that a tax upon a corporate franchise, or upon the privilege of taking under the statutes of wills and of descents, is a tax not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the State".

As there is no substantial difference between taxes upon corporate franchises and succession taxes, the long line of decisions establishing the validity of inheritance taxes, as "excises", is directly in point here. Being "excises", their validity is not questionable by reason of the fact that United States tax-exempt securities, or State or municipal bonds, or other instrumentalities of State governments, are included within the estate or capital thus subjected to an excise tax.

Scholey v. *Rew*, 23 Wall. 331.
Knowlton v. *Moore*, 178 U. S. 41.
Plummer v. *Coler*, 178 U. S. 115.

Murdock v. *Ward*, 178 U. S. 139.
Snyder v. *Bettman*, 190 U. S. 249.
Mager v. *Grima*, 8 How. 490.
United States v. *Perkins*, 163 U. S. 625.
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283.
New York v. *Roberts*, 171 U. S. 658.
Orr v. *Gilman*, 183 U. S. 278.
Billings v. *Illinois*, 188 U. S. 97.
Blackstone v. *Miller*, 188 U. S. 189.
Campbell v. *California*, 200 U. S. 87.
Cahen v. *Brewster*, 203 U. S. 543.
Chanler v. *Kelsey*, 205 U. S. 466.
Buck v. *Beech*, 206 U. S. 392, 408.

The Corporation Tax cannot properly be held to be a property tax rather than an "excise", without overruling the succession tax decisions, unless some legitimate distinction can be drawn between a succession tax and a tax upon corporate franchises or privileges, and this Court has already stated that no such distinction exists, both being regarded as "excises".

This Spanish War Revenue Act of 1898 covered also various other classes of taxes which have been held to be "excises".

In *Nicol* v. *Ames* (173 U. S. 509), it was held that the tax imposed upon "each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery" constituted an "excise", and not a direct tax requiring apportionment, and was therefore constitutional, the Court (p. 519) stating that "the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act", and that "the amount of such a tax when imposed in a case like this may

be increased or diminished by the extent to which the privilege or facility is used, and it is measured in this act by the value of the property transferred by means of using such privilege or facility, but this does not make the tax a direct one".

In *Treat* v. *White* (181 U. S. 264) taxes levied on "calls" for shares of stock were held to be valid "excises".

In *Patton* v. *Brady* (184 U. S. 608) taxes levied upon "all tobacco and snuff, however prepared, manufactured and sold, for consumption or sale" and "held and intended for sale" at the date of the act, were held to be "excises".

In *Thomas* v. *United States* (192 U. S. 363) the stamp tax on memoranda or contracts for the sale of certificates of stock, was upheld as a valid "excise", upon the ground (p. 371) that "the sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates".

In *McCray* v. *United States* (195 U. S. 27) it was held that the Oleomargarine Act of 1886, imposing a tax upon oleomargarine, artificially colored so as to look like butter, constituted a valid "excise" duty, irrespective of the fact that natural butter artificially colored was not so taxed. See also *In re Kollock*, 165 U. S. 526.

If there were no other precedents involved, we submit that the tax involved in *Spreckels Sugar Refining Co.* v. *McClain* (192 U. S. 397) was so closely analogous to the Corporation Tax that this decision alone would be decisive, to the effect that the tax here involved was an "excise", rather than a direct tax upon property. In that case, Section 27 of the War Revenue Act of 1898 was under consideration, which provided that "every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, . . . whose gross annual receipts exceed two hundred and fifty thousand

dollars, shall be subject to pay annually a special excise tax equivalent to one-quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of two hundred and fifty thousand dollars". This tax was held to be an "excise", and not subject to any constitutional objection.

Mr. Justice Harlan there said (p. 411): "Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts."

The close similarity between that act and the language of the Corporation Tax law is apparent. There, as here, the tax was not, in terms, levied directly upon the gross receipts, but at a rate "equivalent to" a certain percentage upon such receipts. The tax was there measured by the "gross amount of all receipts"; here by the "entire net income". There, as stated by the Court (p. 411), the tax was not imposed upon the gross annual receipts as property, but only "in respect of the carrying on or doing the business of refining sugar". Here the act, in terms, imposes the tax "with respect to the carrying on or doing business by such corporation".

In *New York* v. *Roberts* (171 U. S. 658), the New York State tax upon the "franchise or business" of corporations, domestic and foreign, based on the amount of their capital stock employed within the State, was upheld as an "excise", notwithstanding certain discriminatory exemptions, and the claim that the tax was invalid because a portion of such capital consisted of imported goods in the original packages. Mr. Justice Shiras there said (p. 664): "Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a

corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

It is unnecessary to make extended reference to the numerous instances which have occurred ever since the foundation of our Government, where taxes have been upheld as "excises", when levied upon privileges, professions, vocations, occupations, special kinds of business, particular business transactions and the like. (See *Scholey* v. *Rew*, 23 Wall. 331, 348.) As was said by Mr. Justice Brown, referring to stamp taxes upon documents, in *Snyder* v. *Bettman* (190 U. S. 249, 253): "Referable to the same principle is the power of Congress to tax occupations which can only be carried on by permission of the state authorities and under conditions prescribed by its laws — such, for instance, as the profession of a lawyer or physician, or the business of dealing in spirituous liquors, for which licenses are required under the laws of nearly all the States. While the power of Congress to impose such taxes may never have been expressly affirmed by this court, it does not seem to have been seriously questioned, and is a legitimate inference from *McGuire* v. *The Commonwealth*, 3 Wall. 387; *The License Tax Cases*, 5 Wall. 462; *Pervear* v. *The Commonwealth*, 5 Wall. 475, and *Royall* v. *Virginia*, 116 U. S. 572, 580".

II.

AS AN EXCISE TAX, THE CORPORATION TAX IS UNIFORM, AND OTHERWISE FULLY COMPLIES WITH ALL CONSTITUTIONAL REQUIREMENTS.

If the Corporation Tax were a direct tax, within the meaning of the Constitution, nothing could be said in favor of its validity, because no attempt has been made to apportion

the tax among the several States, according to their population. But, on the contrary, it has been shown that this tax is an "excise", and not a direct tax upon property. As an "excise", it must be "uniform throughout the United States". (U. S. Const., Art. 1, Sec. 8.)

It is now well settled that this Constitutional requirement refers merely to geographical uniformity, and not to "intrinsic uniformity", and that it merely means that, whatever may be the subject of taxation which is selected, this must be taxed at the same rate throughout the United States.

Knowlton v. *Moore*, 178 U. S. 41.
Patton v. *Brady*, 184 U. S. 608, 622, 623.

No question can be raised with respect to the Corporation Tax, so far as geographical uniformity is concerned, for there is no doubt that it is intended to operate at the same rate throughout all parts of the United States.

Special Constitutional Objections which have been Urged.

1. It has been urged that a corporate franchise, being a creature of the State, which alone has the power to create, regulate and destroy it, cannot be made subject to taxation by the Federal Government. In our dual system of Government, all proper subjects for taxation are located within the taxing jurisdiction of two distinct sovereign powers. The same taxable object may be taxable by each of them. The fact that corporate franchises are conferred by the State, and are subject solely to the regulation of the State, when the corporation is not engaged in interstate commerce, does not withdraw this subject for taxation from the jurisdiction of the National Government, unless some clause of the Federal Constitution can be referred to which thus limits the power of Congress. No such limitation exists. On the contrary, the power granted to the Federal

Government to impose taxes and excises, is granted unreservedly, and without limitation, excepting only that direct taxes must be apportioned, and that excises must be levied in accordance with the rule of uniformity. It suffices, therefore, to show that corporate franchises are ordinary and proper subjects for excise taxation, whether in State schemes of taxation or elsewhere. If so, they come within the broad and general powers conferred upon Congress, to impose taxes and excises on all ordinary and proper subjects for such taxation, irrespective of the consideration that corporate franchises are, at the same time, subject to State taxes and excises, or that they are created, and may be regulated or destroyed by the State alone. It must now be considered as fully established that corporate franchises are properly subject to Federal excise taxes, notwithstanding the fact that the corporation may not be engaged in interstate commerce, and so is not subject in any way to Federal regulation or control.

Knowlton v. *Moore*, 178 U. S. 41.
Snyder v. *Bettman*, 190 U. S. 249, 252.
Scholey v. *Rew*, 23 Wall. 331.

2. The Constitutional objections urged against this Act are unsound, so far as they are based upon the kind or character of property, whether land, mines, tax-exempt securities, United States bonds or other forms of property held by the several corporations now before the Court. Such objections are based upon the assumption that the kind or character of property in which the capital of the corporation is invested present special reasons for attacking the Constitutionality of the law. Whereas, as shown above, if this is an excise tax upon the corporate franchises, or upon the right of doing business, it is utterly immaterial, as is the case with all excise taxes, what kind of property is held by the corporation, or, indeed, whether

it has any property at all. As was stated by Mr. Justice Shiras, in *New York State* v. *Roberts*, 171 U. S. 658, 664: "From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested".

3. The objection is made that this law is an infringement upon the sovereign rights of the States, and the power of the several States to tax corporations created by themselves, and subject solely to the regulation of the States because not engaged in interstate commerce. The proposition is thus stated by Mr. Justice White: "Wherever a right is subject to exclusive regulation by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having a mission to regulate". The proposition, as thus stated, was denied in *Knowlton* v. *Moore*, 178 U. S. 41, 59.

4. It is objected that this Corporation Tax is unreasonable and unnecessary, especially in times of peace, and that it is unfair to select the corporations of the country as the victims of this special kind of taxation, when firms and individuals engaged in the same lines of business are exempt from the tax. These and similar considerations are exclusively legislative questions, and the judgment of Congress with respect thereto is final and conclusive, as was stated by Mr. Justice Brewer, in *Patton* v. *Brady*, 184 U. S. 608, 623: "It is not the province of the judiciary to inquire whether the excise is reasonable in amount, or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final". Nor upon similar grounds can the objection be sustained, that this legislation is unjust or unwise, or that some ulterior or wrongful purpose or motive has induced the legislation, as here it has been suggested that, aside from the

revenue to be collected, Congress had the ulterior purpose, by means of sworn returns, of arriving at information and publicity regarding the internal affairs of large corporations and trusts. But, as was stated by Mr. Justice White in *McCray* v. *United States*, 195 U. S. 27, 54: "No instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. . . .

(p. 56.) The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."

5. The further objection has been raised that this legislation infringes the due process clause of the Fifth Amendment upon the ground that this Act of Congress was a mere arbitrary imposition of an excise on corporations, whereas, firms and individuals engaged in the same lines of business are not subject to such taxation. While this objection might be raised in a case where the taxing power, without any basis for classification, had arbitrarily taxed one article, and excluded another article of the same class, it clearly can have no application to a case where corporations, or associations similar to corporations, having a capital stock divided into shares, are put into one class, and all firms and individuals, not doing business in a corporate form, are put in another distinct class. The classification of corporations and non-corporations presents such obvious distinctions that it is unnecessary to argue that there is a reasonable basis for such classification. See *McCray* v. *United States*, 195 U. S. 27; *Board of Education* v. *Illinois*, 203 U. S. 553.

If it were sound that laws taxing corporation supon their franchises or privileges must also tax all individuals con-

ducting the same kind of business, then every excise tax levied on corporate franchises or privileges must have conflicted with the Fifth Amendment. But many such excise taxes have been sustained by this Court, as shown above.

6. No objection to the constitutionality of this Act, based upon the due process clause of the Fifth Amendment, can fairly be urged, unless this Act is a confiscatory statute or is a mere arbitrary exertion of the taxing power without any basis whatever for classification, arbitrarily taxing one article and failing to tax another article which fairly and legitimately comes within the same class. Clearly that is not the case here. Indeed, it has never been decided that even in such cases the due process clause would render such an act unconstitutional. It was assumed but not decided to be a legitimate contention in *McCray* v. *United States*, 195 U. S. 27, where it was argued there was such an arbitrary classification, and an abuse of the taxing power by imposing a tax on oleomargarine artificially colored so as to look like butter and by leaving untaxed artificially colored natural butter, Mr. Justice White there stating (p. 61): "Conceding merely for the sake of argument that the due process clause of the Fifth Amendment would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand"; and further stating (p. 64): "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was

not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated: that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights".

As the class here under consideration was composed of all the corporations in the country, except charitable corporations and the like, it is obvious that no such case is here presented as would bring into question the constitutional validity of a law which arbitrarily and without reason taxed certain members of a class, and exempted from taxation other persons in like situation, and coming under the same classification, for here all corporations of every kind, and associations having a *quasi* corporate form, having a capital stock divided into shares, are made subject to the tax, with the mere exception of charitable corporations and the like. In other words, all corporations and organizations having a *quasi* corporate form, and carrying on business for profit, form the class which is subjected to the tax, and all corporations throughout the United States, coming under this classification, are taxed at the same rate.

If it be further argued that it is an infringement of the due process clause, or that there is a denial of the equal protection of the laws, where all corporations are designated as a class, and subjected to an excise tax, while all individuals and firms, not pursuing business in a corporate form, though engaged in the same line of business, are put into a distinct class and exempted from the excise tax, upon the ground that such designation is discriminatory and an arbitrary abuse of the taxing power, it is sufficient to say that the decisions of this Court give no countenance to the theory that the selection by Congress of one class as a proper subject for excise taxation, rather

than another class, presents any reason for judicial interference, upon the ground that any provision of the Constitution has been contravened. As was said in *Spencer* v. *Merchant*, 125 U. S. 345, 355, by Mr. Justice Gray: "In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons: but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected".

The same idea was expressed by the Court, speaking through Mr. Justice White, in *McCray* v. *United States*, 195 U. S. 27, 61, in these terms: "The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artifically colored oleomargarine and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties".

See also *Treat* v. *White*, 181 U. S. 264, 269.
Patton v. *Brady*, 184 U. S. 608, 623.

7. One other suggestion should be referred to, which was persistently referred to in the arguments in the Income Tax cases, to the effect that in order to determine whether a tax is direct rather than indirect, it must first be ascertained whether the one upon whom the burden of paying it is first cast, can shift the burden to another person, it being

claimed as a theory of economics that if the burden cannot thus be shifted, the tax must necessarily be a direct tax, and consequently, that because income taxes, succession taxes and the like cannot be shifted, they must, therefore, be direct taxes, requiring apportionment. It is further argued that this was the decision of the Court in the Income Tax cases. This proposition was, however, fully met by Mr. Justice White in *Knowlton* v. *Moore*, 178 U. S. 41, 82.

8. An excise tax cannot be attacked upon the ground that it indirectly taxes or interferes with the instrumentalities of the State or Federal governments, for it is not a tax on property, and the kind of property indirectly is a matter of no consequence.

Van Allen v. *The Assessors*, 3 Wall. 573.
Snyder v. *Bettman*, 190 U. S. 249.
Home Insurance Co. v. *New York*, 134 U. S. 594.
South Carolina v. *United States*, 199 U. S. 437.
Knowlton v. *Moore*, 178 U. S. 41.

9. It is further contended in 2*a* of the Assignments of Error (Record, p. 10) that the special excise tax imposed on corporations under Section 38 of the Revenue Act of Congress, approved August 5, 1909, is unconstitutional, because it appears that the provisions contained in that Section "originated in the Senate of the United States and were concurred with by the House of Representatives subsequent thereto. Whereas, it is provided by the Constitution of the United States, Article 1, Section 7, that all measures for raising revenue shall originate in the House of Representatives".

Granted that the provisions of this section had their origin in the Senate, it was only by way of amendment to a revenue act having its origin in the House of Representatives. There can be no question that the Senate has

the power to amend a revenue bill, for that power is expressly conferred upon it by the Constitution.

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills." Constitution of the United States, Article 1, Section 7, Clause 1.

This power to amend is not confined to the elimination of provisions contained in the original act, but embraces as well the addition of such provisions thereto as may render the original act satisfactory to the body which is called upon to support it. It has, in fact, been held that the substitution of an entirely new measure for the one originally proposed can be supported as a valid amendment.

Brake v. *Callison*, 122 Fed. 722.

In that case it was said by the court, p. 724, that "a proposition may be amended by an alteration which entirely defeats the purpose of the movers, or it may be turned into a motion of a different kind. The House is not obliged to consider a proposition which is moved and seconded, but it is within its power to substitute a different proposition, and this may be done by means of an amendment. This appears to have been the established law of parliamentary usage in England, and, though it appears to have been modified at an early date in our legislative law in some respects, I find that it has only been restricted to changes bringing in a subject different from the original."

But it is submitted that it is unnecessary to go into the question of whether this was a proper amendment, for it is well settled in this Court that the validity of a law which appears upon its face to have been properly enacted by Congress and duly approved by the President, cannot be assailed because of alleged informalities in its passage, and that the Journals of Congress are not admissible evidence for that purpose.

Marshall Field & Co. v. *Clark*, 143 U. S. 649.
Harwood v. *Wentworth*, 162 U. S. 547.

We accordingly submit that the corporation tax was not a direct tax upon property, but was an excise properly imposed upon the corporate franchises, or upon the right or privilege of doing business in a corporate form, or upon the business of the corporation; that in any aspect it was an excise tax, and that, being such, it was immaterial what kind of property the corporation held, or had invested its capital in, whether mines, land, income from land, United States bonds, State or Municipal bonds, tax-exempt securities, or other forms of property, or indeed, whether it had any property at all; that the excise imposed was uniform throughout the United States, within the meaning of the Constitution, and did not conflict with the due process clause or any other clause of the Federal Constitution, and was, therefore, constitutional and valid.

CHARLES A. SNOW,
JOSEPH H. KNIGHT,
Counsel for Appellees.

Supreme Court of the United States.

October Term, 1910.

No. 775.

JOSEPH E. GAY,
APPELLANT,

v.

THE BALTIC MINING COMPANY ET AL.,
APPELLEES.

Supplemental Brief for Appellees, upon Re-Argument.

I.

THE GOVERNMENT HAS MISCONCEIVED THIS CASE, ATTEMPTING TO SUPPORT THE TAX UPON THE WRONG GROUND, NAMELY, THAT THIS IS AN EXCISE UPON BUSINESS OR UPON THE ACTUAL TRANSACTION OF BUSINESS. — THE CORRECT GROUND UPON WHICH THIS ACT SHOULD BE SUSTAINED, SO FAR AS CORPORATIONS ARE CONCERNED, IS THAT IT IMPOSES AN EXCISE UPON A CORPORATE FRANCHISE, NAMELY, THE FRANCHISE OF DOING BUSINESS AS A CORPORATION, OR IN A CORPORATE FORM. — THE FACT THAT PRIVILEGE TAXES, AS AGAINST JOINT STOCK COMPANIES AND ASSOCIATIONS, AND CERTAIN INSURANCE COMPANIES, NOT POSSESSED OF CORPORATE FRANCHISES, ARE ADDED, DOES NOT AFFECT THE PROPER CONSTRUCTION OF THE TAX UPON CORPORATIONS, AS BEING AN EXCISE LEVIED UPON A CORPORATE FRANCHISE.

The Government has rested its case upon certain defined grounds, both in its original brief and at the

first argument. We submit that stronger and more conclusive grounds exist, in favor of the constitutionality of this tax.

The Government maintains that this is an excise on business, or on the actual conduct or transaction of business.

We submit that it is properly an excise imposed upon a corporate franchise, namely, the franchise of doing business as a corporation, or in a corporate form, so far as the tax upon corporations is concerned; that by the same Act excises are also imposed upon certain privileges so similar to corporate franchises that they may properly be termed *quasi*-corporate franchises; and that such excise taxes are open to no constitutional objection.

The Government theory, we submit, unnecessarily opens the door to new and doubtful questions which, upon our construction, are not in the case at all. It is true that casual, incidental expressions may be found in the Government's brief, indicating the belief that possibly the tax might also be supported as an excise on corporate franchises, but the main contention of the Government, repeatedly insisted upon, is that this is a tax on business, or on the transaction of business, and not upon any corporate franchise.

Government's Ground for supporting Constitutionality of this Tax.

The Government's claim is thus expressed (Original Brief for United States, pp. 8, 9):

This tax is an excise on "the actual conduct or transaction of business. . . . The property of the company is not the subject of the tax; *the franchises of the company are not the subject of the tax.*"

Correct Ground for sustaining the Tax, as claimed by these Appellees.

We submit, on the contrary, that this tax is an excise imposed upon the franchise of doing business as a corporation, or in a corporate form, and also upon certain franchises or privileges so similar thereto that they may properly be termed *quasi*-corporate franchises; that a tax laid upon corporate franchises or privileges is an excise, and not a property tax; that such taxes have repeatedly been upheld as excises; that this tax, considered as an excise upon corporate franchises or privileges, cannot be held to be unconstitutional without overruling various decisions of this Court; that, if an excise, the character of the property owned by the different corporation defendants, whether land, rents, mines, easements or franchises in the public streets, United States bonds, tax-exempt securities, or other forms in which their capital may be invested, is an immaterial factor, for an excise is not in any sense a property tax; that if this

tax is an excise laid upon a corporate franchise or privilege, all arguments based upon the Fifth Amendment are wholly apart from the issues properly involved in the case, for if the tax is imposed upon the franchise or privilege of doing business as a corporation, or in a *quasi*-corporate form, it is wholly within the discretion of Congress to select franchises as the proper subject for an excise, and to leave untaxed all other subjects, and therefore that it is wholly immaterial here that Congress, having selected corporate franchises and *quasi*-corporate franchises or privileges as the subject of the tax, has, in its discretion, left untaxed all firms and individuals, even though conducting the same kinds of business as the corporations taxed; and that, consequently, this tax, considered as an excise upon corporate franchises, or *quasi*-corporate franchises or privileges, is plainly constitutional within well-settled principles.

We do not, however, mean to imply that the tax might not also be sustained upon the main ground urged by the Government, that this is a tax upon business, or upon the actual conduct or transaction of business, rather than upon the franchise of doing business as a corporation, or upon the franchise or privilege of transacting business in a *quasi*-corporate form.

It should, however, be pointed out that the case becomes vastly simplified, if rested squarely and directly upon the unquestioned constitutional power of the Federal Government to levy an excise upon a

corporate franchise or privilege. For then the Fifth Amendment, and the able and ingenious arguments here presented with reference thereto, are out of the case. No one will suggest that a tax upon a corporate franchise, otherwise good, becomes constitutionally objectionable because of the mere fact that firms and individuals not possessing corporate franchises are not also taxed. An excise upon a corporate franchise is constitutionally valid, not because there has been proper classification under the Fifth Amendment, but because of the general power of Congress to select the subjects for excise taxation. In such case no classification is necessary, and arguments as to discrimination and arbitrary classification become immaterial. The simple inquiry is whether a corporate franchise properly comes within the scope of the taxing powers of Congress. The fact that something else has escaped taxation, or that firms and individuals not subject to excise taxation, or that other appropriate subjects for excise duties, like vocations, employments, special privileges, particular business transactions and the like, have not, at the same time and by the same law, been subjected to taxation, presents wholly immaterial considerations.

Moreover, the selection of the proper ground upon which to support this tax involves important differences with respect to the persuasive or conclusive character of previous adjudications of this Court. Thus, taxes upon various corporate franchises or privileges have repeatedly been sustained as excises. We maintain that the Civil War tax decisions as to

excises upon various corporate franchises, practically require a decision in favor of the validity of an excise imposed upon all the corporations of the country, unless those decisions are to be regarded as overruled; but if not, it is only a step, by way of analogy, from those cases to a decision upholding this tax as an excise tax upon corporate franchises or privileges, properly assessed upon every corporation organized for profit and having a capital stock represented by shares. On the other hand, when this tax is attempted to be supported as an excise upon business, or upon the "actual conduct or transaction of business," we are confronted with the situation that, while this Court has repeatedly held that special kinds of business, or various kinds of particular business transactions, may be singled out as the subjects of excise taxation, it has never thus far determined that an excise may properly be imposed upon *all kinds* of business conducted in the country. In such a case, the question fairly arises, as exemplified in the Stone Tracy case now before the Court, why should a certain kind of business be taxed, when carried on by a corporation, and the same business, when conducted by a firm or individual, remain untaxed? Immediately, questions here arise as to arbitrary taxation, and as to classification, which could not fairly be raised if the tax is supported as an excise upon a corporate franchise. In reply to attacks based upon the Fifth Amendment, the only classification attempted by the Government comes back to the distinction between business, as transacted in a corporate

form, and as conducted by firms or individuals. We submit that it is simpler, as well as a more reasonable construction of this law, to hold that this is an excise imposed upon the *franchise* of conducting business as a corporation, or in a corporate or *quasi*-corporate form, and that, as such, it is open to no constitutional objection.

It is not easy to understand why the Government prefers to rest its case mainly upon the ground that this is a tax upon *business*, or the *transaction* of business, rather than upon corporate franchises, an attitude which opens the law to all sorts of constitutional attacks, as exemplified by the elaborate briefs filed in behalf of the various appellants. Possibly the Government fears that it may be held that a tax upon a corporate franchise, which is, in a sense, a property right, is a property tax, and therefore a direct tax, and so is unconstitutional because not apportioned according to population among the several States. But if it should so be held, all the cases in this Court, supporting various taxes upon corporate franchises, as excises, and holding them not to be property taxes, were erroneously decided. No case has ever been decided by this Court in which such taxes upon corporate franchises were sustained upon any other ground than that they did not constitute property taxes, but were excises.

Beginning with early times this Court has uniformly held that taxes upon corporate franchises were excises, and not property taxes, and that, as property taxes, they could not be supported.

Hamilton Co. v. *Massachusetts*, 6 Wall. 632.
Society for Savings v. *Coite*, 6 Wall. 594.
Provident Institution v. *Massachusetts*, 6 Wall. 611.
Pacific Ins. Co. v. *Soule*, 7 Wall. 433.
Railroad Co. v. *Collector*, 100 U.S. 595.
Veazie Bank v. *Fenno*, 8 Wall. 533.
Home Ins. Co. v. *New York*, 134 U.S. 594.
New York v. *Roberts*, 171 U.S. 658.

As stated by Mr. Justice CLIFFORD, —

"Corporate franchises . . . are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation by virtue of their charter, and the rule is equally well settled that the privileges and franchises of a private corporation, unless exempted in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the State. . . . All trades and avocations by which the citizens acquire a livelihood may also be taxed by the State for the support of the State Government. Power to that effect resides in the State independent of the Federal Government, and is wholly unaffected by the fact that the corporation or individual has or has not made investments in Federal securities."

Hamilton Co. v. *Massachusetts*, 6 Wall. 632, 638, 639.

Society for Savings v. *Coite*, 6 Wall. 594, 606, 607.
Veazie Bank v. *Soule*, 8 Wall. 533, 547.

It is equally well settled that, owing to our dual form of government, the Federal Government may also impose excises upon privileges or franchises, even though granted by and subject to the exclusive regulation of the State.

Knowlton v. *Moore*, 178 U.S. 41, 58, 59.

II.

PROPER SUBJECT OF THE EXCISE DUTY IMPOSED BY THE FEDERAL CORPORATION TAX LAW, SO FAR AS CONCERNS CORPORATIONS, IS THE CORPORATE FRANCHISE OF DOING BUSINESS AS A CORPORATION. — THE GOVERNMENT CLAIM THAT THIS IS AN EXCISE UPON BUSINESS, OR THE TRANSACTION OR CONDUCT OF BUSINESS, IS NOT SOUND.

What is the *subject* of the excise duty created by the Federal Corporation Tax law? The Government's main contention (Original Brief for United States, p. 8) is that it is the "actual conduct or transaction of business." The Government urges that "the *subject* of the tax is thus expressly declared to be 'the carrying on or doing business by' the companies taxed; . . . *the franchises of the company are not the subject of the tax.*" (*Ibid.* p. 9.)

The words of the Act specially relied upon in the Government brief (p. 9) may be significant, but of

still more importance is the fact that the Act in terms provides as to the *subject* of the tax. It provides "that every *corporation*, *joint stock company or association*, organized for profit and *having a capital stock represented by shares*, and every insurance company . . . shall be *subject* to pay annually" the specified tax; and that this excise tax shall be paid "with respect to the carrying on or doing business *by such corporation*, joint stock company or association, or insurance company."

The *corporation* is the *subject* of the tax, according to the literal terms of the Act. Nor is the language confined to the "carrying on or doing *business*," but the special excise tax is imposed "with respect to the carrying on or doing business *by such corporation*, joint stock company or association, or insurance company." In other words, upon the face of the Act, the real *subject* of the tax is the corporate form of organization, or the franchise of doing business *as a corporation*, or a form of organization so closely allied to the corporate form as to be tantamount to it.

It is, indeed, questionable whether the special clause relied on by the Government tends to clarify the meaning of the Act. If this clause had been omitted and the special organizations, like insurance companies, and joint-stock companies and associations eliminated, and the Act had been specifically confined to corporations, it would then have read: "That every corporation organized for profit and having a capital stock represented by shares shall be

subject to pay annually a special excise tax equivalent to one per centum upon the entire net income over and above $5,000." If the Act had been in this form, it could not be questioned that it would have constituted an excise duty imposed on corporate franchises and measured by the amount of the net income. In that form it would clearly have come under various previous decisions supporting such taxes upon corporate franchises as excises, and not as property taxes. Is the intent of the Act changed by the addition of the special clause relied on by the Government, and by the inclusion of certain *quasi* corporations, as well as insurance companies? It would seem not. It is probable that this clause was added with special reference to insurance companies and joint-stock companies not possessed of corporate franchises, for the purpose of excluding a possible inference that, as applied to them, the tax might be considered as imposed upon their net receipts, considered as property. The language of this clause was evidently copied from the language of Mr. Justice HARLAN, in the opinion rendered in the Sugar case (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U.S. 397, 411) where it was stated,—

> "Clearly the tax is not imposed upon gross annual receipts as property, but only *in respect of the carrying on or doing the business of refining sugar.*"

[The language of our Act is "doing business *by such corporation*," etc.; there it was "doing the business of refining sugar."]

In the Sugar case the law was sustained as being an excise upon a particular business, or upon the transaction of a particular business, and could not have been sustained otherwise, for the Act covered individuals and firms as well as corporations, and the subjects of the tax were expressed to be "every person, firm, corporation, or company carrying on or doing the business of refining petroleum or refining sugar," etc.

In the present case, individuals and partnerships are not affected by this tax, which is expressly confined to corporations, organizations similar thereto and possessing a *quasi*-corporate form, and to insurance companies. We submit that the *subject* of this tax is the corporate form of organization or the franchise of doing business as a corporation, or in a corporate or *quasi*-corporate form, and that, considered as an excise upon a corporate franchise, the tax is within the constitutional powers of the Federal Government, as settled by various decisions of this Court. The distinction may seem slight between an excise imposed upon the *franchise* of doing business as a corporation, and a tax upon *business* when conducted by a corporation. We submit that, from either point of view, the excise would be constitutionally valid. But the distinction creates important differences with respect to the questions now open for argument. Important and difficult questions under the Fifth Amendment may fairly be raised and argued, if the tax be regarded as an excise upon *business*, whereas no such questions are open, if con-

sidered as an excise upon a corporate or *quasi*-corporate franchise or privilege. Moreover, if this is an excise upon a corporate franchise or upon the franchise of doing business as a corporation, all questions as to the character of property possessed by these corporation defendants become wholly immaterial, and are concluded by the previous decisions of this Court, for, as stated by Mr. Justice SHIRAS,—

> "From the very nature of the tax, being laid as a tax upon the *franchise of doing business as a corporation*, it cannot be affected in any way by the character of the property in which its capital stock is invested."
>
> *New York State* v. *Roberts*, 171 U.S. 658, 664.
> *Plummer* v. *Coler*, 178 U.S. 115, 135, 137.

As stated by Mr. Justice FIELD, upholding a State tax upon the "corporate franchise or business" of "every corporation, joint stock company or association,"—

> "By the term 'corporate franchise or business,' as here used, we understand is meant . . . the right or privilege granted by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity."
>
> *Home Ins. Co.* v. *New York*, 134 U.S. 594, 599.
> See *Southwestern Oil Co.* v. *Texas*, 217 U.S. 114, 123.

III.

THE CORPORATION TAX, REGARDED AS AN EXCISE UPON THE FRANCHISE OF DOING BUSINESS AS A CORPORATION, OR IN CORPORATE FORM, IS CONSTITUTIONAL AND VALID, WITHIN VARIOUS PREVIOUS DECISIONS OF THIS COURT. — IF SUCH AN EXCISE SHOULD BE HELD UNCONSTITUTIONAL, THESE DECISIONS MUST BE OVERRULED.

If this tax be regarded as an excise upon a corporate franchise or privilege, or upon a *quasi*-corporate franchise or privilege, as we contend, the constitutional validity of such an excise is settled by the previous adjudications of this Court. If it should be held that such an excise is not constitutional, some or all of the following decisions were erroneously decided, and must now be overruled, —

Pacific Ins. Co. v. *Soule*, 7 Wall. 433, holding to be an excise, and not a direct tax, the Civil War tax upon insurance companies based and levied upon the "amounts insured, renewed, or continued by insurance companies; upon the gross amount of premiums received and assessments by them" and also upon "dividends, undistributed sums, and income."

Society for Savings v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611, holding taxes upon savings banks, based on the aggregate amount of their deposits, to be excises and not property taxes.

Hamilton Co. v. *Massachusetts*, 6 Wall. 632, holding a tax on a manufacturing corporation, based upon the excess of the market value of its capital stock

over and above the value of its real estate and machinery, to be an excise and not a property tax.

Railroad Co. v. *Collector*, 100 U.S. 595, holding the Civil War tax to be an excise and not a property tax, which provided that railroad, canal, and turnpike, and certain similar classes of corporations, which should issue bonds upon which interest was to be paid, or should declare dividends payable to their stockholders as part of the "earnings, profits, income or gains of such company," and "all profits of such company carried to the account of any fund, or used for the construction," should be subject to and pay a tax of 5 per cent on the "amount of all such interest or coupons, dividends or profits."

The above case was followed in —

United States v. *Erie R.R. Co.*, 106 U.S. 327, —

and expressly approved in, —

Railroad Co. v. *United States*, 101 U.S. 543, 550.

Bailey v. *Railroad Co.*, 106 U.S. 109, 115.

Memphis & Charleston R.R. Co. v. *United States*, 108 U.S. 277, 279.

Veazie Bank v. *Fenno*, 8 Wall. 533, holding to be an excise and not a property tax, a 10 per cent tax on "the amount of notes of any State bank, or State banking association, paid out" after a specified date

by any "National banking association, State bank or State banking association," Chief Justice CHASE stating (p. 547), —

> "But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property."

New York State v. *Roberts*, 171 U.S. 658, holding to be an excise and not a property tax, a statute of New York, providing that "every *corporation, joint stock company or association* [the exact words of our law] whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in this State [with certain exceptions] . . . shall be liable to and shall pay a tax as a tax upon its franchise or business," and based upon the "amount of capital stock employed within this State."

Home Ins. Co. v. *New York*, 134 U.S. 594, upholding the same New York statute as an excise upon "its corporate franchise" defined by the Court (p. 599) as meaning "the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity."

This case is conclusive as to State excise taxes

imposed upon corporate franchises. No distinction can be drawn as to Federal excises imposed upon franchises granted by the State, for it has been expressly held that privileges granted by the State and subject to the exclusive regulation of the State, like the right of inheritance, may still be taxed, as excises, by the Federal Government, the power of taxing franchises and privileges, as excises, not being confined to the "government having the mission to regulate."

Knowlton v. *Moore*, 178 U.S. 41, 59.
See also *Pembina Mining Co.* v. *Pennsylvania*, 125 U.S. 181.
Horn Silver Mining Co. v. *New York*, 143 U.S. 305.

Above all, the long line of decisions upholding State and Federal inheritance taxes as excises, must also, in that event, be regarded as overruled, for they were decided upon the analogy of what was supposed to be a settled line of decisions upholding taxes upon the franchises of corporations as excises, this Court stating, in *Plummer* v. *Coler*, 178 U.S. 115, 137,—

> "We are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon *franchises of corporations*, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents."

> (Page 135:) "We return to the authorities, by which it has been established that a tax upon a *corporate franchise*, or upon the privilege of taking under the statutes of wills and of descents, is a tax not upon United States bonds if they happen to compose a part of the capital of a corporation or a part of the property of a decedent, but upon rights and privileges created and regulated by the State."

If taxes upon corporate franchises cannot be upheld as excises, it follows that the inheritance tax cases, which were expressly based upon the analogy of excises upon corporate franchises, must also be overruled, including *Plummer* v. *Coler*, *supra*.

See other inheritance tax cases, —

Knowlton v. *Moore*, 178 U.S. 41.
Scholey v. *Rew*, 23 Wall. 331.
Murdock v. *Ward*, 178 U.S. 139.
Orr v. *Gilman*, 183 U.S. 278.
Snyder v. *Bettman*, 190 U.S. 249.
Cahen v. *Brewster*, 203 U.S. 543.
Chanler v. *Kelsey*, 205 U.S. 466.
Buck v. *Beach*, 206 U.S. 392, 408.

And numerous other inheritance tax cases, following the above decisions, must also be overruled.

If, on the other hand, this tax should be considered as an excise upon *business*, it is submitted that the Court should follow *Spreckels Sugar Refining Co.* v. *McClain*, 192 U.S. 397, 413.

If this is an excise duty of any kind, it cannot be attacked upon the ground that it taxes or interferes

with the instrumentalities of the State or Federal Governments, including Government bonds, State or municipal bonds, and other tax-exempt securities, for if it is an excise tax at all, whether imposed upon franchises or upon business, it is not a tax on property, and therefore the character of the property in which the capital of the corporation may be invested is an immaterial factor.

South Carolina v. *United States*, 199 U.S. 437.
Knowlton v. *Moore*, 178 U.S. 41.
Van Allen v. *Assessors*, 3 Wall. 573.
Home Ins. Co. v. *New York*, 134 U.S. 594.
Snyder v. *Bettman*, 190 U.S. 249.

If this tax, as an excise, was within the delegated powers of Congress, it was wholly within the discretion of Congress to select the objects upon which the excise should be laid, and no constitutional objection can be urged to the statute arising from the fact that corporate franchises were selected rather than something else as the subject of the excise tax.

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, 562.
Home Ins. Co. v. *New York*, 134 U.S. 594, 606, 607.
Southwestern Oil Co. v. *Texas*, 217 U.S. 114, 123.

McCray v. *United States*, 195 U.S. 27, 61.

Spencer v. *Merchant*, 125 U.S. 345, 355.

See also *Treat* v. *White*, 181 U.S. 264, 269.

Patton v. *Brady*, 184 U.S. 608, 623.

As urged by us, if the tax is an excise upon a corporate franchise, no question as to the Fifth Amendment fairly arises. If, however, classification under that Amendment is here important, the distinctions between the corporate form of doing business and the transaction of business by an individual or as a firm are sufficiently clear to warrant the adoption of that distinction as the basis for classification.

McCray v. *United States*, 195 U.S. 27.

Board of Education v. *Illinois*, 203 U.S. 553.

If objection be made to the Act upon the ground that it exempts certain charitable and other organizations, it is to be observed that the exempting clause was in most instances, at least, entirely superfluous, as the Act was only intended to apply to organizations established for profit and having a capital stock represented by shares. Most, if not all of the exempted classes of organizations are not organized for profit, nor have they any capital stock represented by shares.

IV.

ONE PART OF A STATUTE, THOUGH UNCONSTITUTIONAL, IF SEPARABLE FROM REMAINING PROVISIONS OF THE STATUTE, DOES NOT AFFECT THEIR CONSTITUTIONALITY. — SO, HERE, THE MAIN PURPOSE OF THE ACT BEING TO IMPOSE AN EXCISE UPON CORPORATE FRANCHISES, THE CONSTITUTIONAL VALIDITY OF SUCH EXCISES IS NOT IN ANY MANNER AFFECTED BY THE ADDITION OF EXCISES UPON INSURANCE COMPANIES AND JOINT-STOCK COMPANIES AND ASSOCIATIONS, EVEN THOUGH THEY BE REGARDED AS PURELY PRIVILEGE TAXES IMPOSED UPON SPECIAL KINDS OF BUSINESS. — THE ADDITION OF CERTAIN PRIVILEGE TAXES TO EXCISES ON CORPORATE FRANCHISES DOES NOT AFFECT THE CONSTITUTIONAL VALIDITY OF THE LATTER.

> "Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this Court to so declare, and to maintain the act in so far as it is valid."

El Paso & N.E. Ry. v. *Gutierrez*, 215 U.S. 87, 96.

Southwestern Oil Co. v. *Texas*, 217 U.S. 114, 121.

Berea College v. *Kentucky*, 211 U.S. 45, 54, 55.

Field v. *Clark*, 143 U.S. 649, 695.

Huntington v. *Worthen*, 120 U.S. 97, 102.

Allen v. *Louisiana*, 103 U.S. 80, 83.

This proposition is well settled and will be followed by the Court except where the main purpose of the Act is declared to be unconstitutional, and where, accordingly, it may fairly be inferred that Congress would not have enacted the minor parts of the statute if it had understood that the main purpose of the Act could not constitutionally be carried out. This was the case with the minor provisions of the Income Tax.

See *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601, 637.
Southwestern Oil Co. v. *Texas*, 217, U.S. 114, 121.
Poindexter v. *Greenhough*, 114 U.S. 270, 304.
Sprague v. *Thompson*, 118 U.S. 90, 95.
Warren v. *Charlestown*, 2 Gray, 84.
International Text Book Co. v. *Pigg*, 217 U.S. 91, 113.

Here the main purpose of the Act was to tax certain corporate franchises of the 400,000 or more corporations in the country. The fact that it was deemed advisable to add excises upon joint-stock companies and associations, and insurance companies, cannot in any manner affect the constitutional validity of the excise imposed upon corporations. If the additional excises imposed are for any reason unconstitutional, the excises levied upon corporations, being separable, may stand upon their own ground and be regarded as constitutionally valid, irrespective of the

unconstitutionality of other parts of the same statute. But even if joint-stock companies and associations, and certain classes of insurance companies, possess no corporate franchises, the tax may still be sustained as against them, upon the ground that in their case it was a privilege or a particular kind of business that was aimed at by the excise duty imposed. Although certain privilege taxes or excises upon particular kinds of business are thus added to the excise imposed upon the franchise of doing business as a corporation or in a corporate form, this addition cannot affect the nature or the validity of the excise imposed upon certain corporate franchises. If, for example, the Act had said "all corporations with respect to their franchises, and also all lawyers with respect to their vocations, shall be taxed," at a certain rate, the combination in the same statute of a privilege tax imposed upon a business or occupation with an excise levied upon corporate franchises obviously would not affect the construction, character, or constitutional validity of the latter.

We, accordingly, submit that this tax was not a direct tax upon property, but was an excise properly imposed on corporations upon their *franchises* of doing business as corporations and in a corporate form, and imposed on the other organizations named with respect to their privileges or franchises of doing business in a *quasi*-corporate form. If not imposed upon corporate or *quasi*-corporate franchises or privileges, this excise was properly imposed upon *business*,

when transacted or conducted in a corporate or *quasi*-corporate form. In any aspect, this was an excise tax, and, being such, it was immaterial what kind or class of property was held by the corporation, whether tax-exempt securities or otherwise, or, indeed, whether it had any property at all. The excise imposed by this Act was geographically uniform throughout the United States, within the meaning of the Federal Constitution, and did not conflict with the Fifth Amendment to the Constitution by reason of being arbitrary, discriminatory, or lacking proper classification. Nor did it conflict with any other clause of the Federal Constitution. The excise imposed by this law was therefore constitutional and valid.

CHARLES A. SNOW,
JOSEPH H. KNIGHT,
of Counsel for Appellees.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 434

PERCY H. BRUNDAGE, APPELLANT,

vs.

BROADWAY REALTY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 3, 1940.

(32,079)

(22,010)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 784.

PERCY H. BRUNDAGE, APPELLANT,

vs.

BROADWAY REALTY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1910.

1 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

PERCY H. BRUNDAGE, Complainant,
against
BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, GEORGE FOSTER PEABODY and GARDINER M. LANE, Defendants.

To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York:

Percy H. Brundage of the City of New York and a citizen of the State of New York and a stockholder in the Broadway Realty Company, brings this his bill of complaint in behalf of himself and all other stockholders who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit against the said Broadway Realty Company, a corporation organized and existing under the laws of the State of New York and an inhabitant of the Southern District of New York and having its principal office in the said District, and Joseph F. Stier of the City of New York and a citizen and inhabitant of the State of New York and Southern District of New York, Charles J. Peabody and George Foster Peabody of Lake George New York and citizens and inhabitants of the State of New York and Northern District of New York, and Gardiner M. Lane of Boston and a citizen and inhabitant of the State of Massachusetts and District of Massachusetts. And thereupon your orator complains and says,

I. The defendant, the Broadway Realty Company, hereinafter styled the defendant company, is a corporation organized and
2 existing under and by virtue of the laws of the State of New York and is a citizen and inhabitant of said State and has its principal place of business at No. 52 William Street in the Borough of Manhattan in the City of New York in the Southern District of New York. The capital stock of said defendant company consists of One million dollars ($1,000,000) divided into Ten thousand (10,000) shares of the par value of One hundred ($100) dollars each. Said defendant company is organized for profit and was formed for the purpose of owning, holding and managing real estate. It owns the office building situated at Nos. 5-11 Broadway in the Borough of Manhattan and City of New York and also certain securities. It is engaged in the business of managing said building, collecting the rents thereof, collecting the income upon said securities and dividing the net income, if any, after payment of all debts and charges, among the stockholders. Said business is transacted and conducted wholly within the City and State of New York. Said defendant company

is engaged in no other business whatever. The entire income of the defendant company is exclusively derived from the rental of said real estate and the income upon said securities.

II. The net income of the defendant company for the year ending December 31, 1909 exceeded Fifty thousand ($50,000) dollars after deducting all expenses, charges, losses, depreciation and taxes; and all interest paid within the year upon its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid up capital stock of the defendant company, and all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations or insurance companies.

III. The defendant, Joseph F. Stier, resides in the City and County of New York and is a citizen and inhabitant of the State of New York and Southern District of New York. The defendants, Charles J. Peabody and George Foster Peabody, reside at Lake George,
3 New York, and are citizens and inhabitants of the State of New York and Northern District of New York. The defendant Gardiner M. Lane, resides in Boston and is a citizen and an inhabitant of the State of Massachusetts and District of Massachusetts. The said individual defendants compose the Board of Directors of the defendant company, there being one vacancy in said Board at the present time due to the recent death of the late Spencer Trask, in his life time a Director of the said defendant company, which vacancy has not yet been filled.

IV. Your orator is a stockholder in the defendant company and the owner and registered holder of six (6) shares of the outstanding stock thereof of the par value of Six hundred ($600) dollars and of an actual value exceeding One hundred and fifty ($150) dollars.

V. By the Certificate of Incorporation of the defendant company and by and under the laws of the State of New York, the management of the property and affairs and concerns of the defendant company is committed to its Board of Directors. Your orator is informed and verily believes that said Board of Directors claim and assert that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled, "An Act to provide revenue to equalize duties and encourage the industries of the United States and for other purposes," enacted on or about August 5th 1909, said defendant company is or will be on or before June 30th 1910 liable to pay to the United States a tax of one percentum upon the entire net income over and above the sum of Five thousand dollars ($5,000) received by said defendant company from all sources during the year ending December 31, 1909, to be computed as provided in said Act, and otherwise to comply with the provisions of said Act.

VI. Your orator is informed and verily believes that the defendant company has received a notice from the United States Collector of Internal Revenue for the Third District of New York calling
4 upon the defendant company to furnish certain information intended to facilitate said Collector and the other taxing authorities of the United States in the imposition, assessment and collection of the tax mentioned and set forth in the said Act of Con-

gress and that the officers and directors of said defendant company intend to furnish said Collector with the information requested and to make such reports and returns as such Collector or any other revenue officer of the United States Government may request, and to comply in all respects with said Act of Congress and pay the tax imposed thereby, whenever the same shall have been ascertained and shall have become due and payable.

VII. Your orator has requested the officers and directors of the defendant company to refuse to comply with the provisions of said Act of Congress and to take all such measures as may be available to contest the validity of said Act, and to oppose its enforcement and resist the imposition, assessment and collection of said tax, and refuse to furnish the information and make the return provided for by said Act, upon the ground that said Act of Congress and said tax sought to be imposed thereby, are contrary to the Constitution of the United States, and therefore void and of no effect, but said officers and directors of said defendant company have nevertheless declared their intention of complying in all respects with said Act as hereinbefore set forth.

VIII. Your orator is advised and verily believes that such action on the part of the defendant company and its officers and directors in complying with said Act and making and filing the return required thereby, and paying the tax imposed thereby, which tax is, as your orator is advised, void and unconstitutional, will unlawfully divert a portion of the funds of said defendant and will thereby render the stock held by your orator, and by other stockholders similarly situated of less value.

IX. Your orator charges that the provisions in respect of said tax, contained in said Act of Congress, are unconstitutional, null and void, in that the said tax, although described in said Act as a Special Excise Tax is in fact and in legal effect a direct tax upon the property held and owned by the defendant, which direct tax is not in and by said Act apportioned among the several States, as required by the Constitution of the United States and that if said tax should be held not to be a direct tax, nevertheless said provisions of said Act are unconstitutional, null and void, in that said tax is not uniform throughout the United States as required by the United — Constitution, but applies only to corporations and associations organized and doing business for profit, and not to individuals or partnerships doing the same or similar business for profit; and further in that the tax impairs property rights vested prior to the passage of said Act of Congress and is imposed upon and in respect of income which accrued prior to the date upon which said Act was passed and approved; and further in that the subject matter upon which said tax purports to be imposed, to wit, the right or franchise to be a corporation, or the doing of business for profit by a corporation deriving its franchise from one of the several States is not within the taxing power of the United States and that such tax is an invasion of the rights and prerogatives of the several States and is a burden and tax upon a prerogative, power, instrumentality, and function of sovereignty belonging to the several States and not delegated to the United States by the Con-

stitution thereof or otherwise. Your orator further charges that the provisions in said Act in respect to the reports and returns to be made by corporations thereunder, and directing that such returns shall be public records open to inspection, violate the consti-
6 tutional prohibition against unreasonable searches, and that thereby the defendant company and every corporation similarly situated may be compelled to produce and disclose their private books and papers in order to make them liable for a penalty or a forfeiture of their property and that the provisions of said Act deprive the defendant company of its property without due process of law and take private property of the defendant company for public use without just compensation, and that said Act is in other respects unconstitutional and void.

X. Your orator further sets forth that if the defendant company proceeds, as threatened, to comply with said Act of Congress, and make the returns and pay the tax required thereby, such action on its part will render your orator's stock in said corporation of less value and less productive, and that such injury is a continuing one, and one which cannot be adequately compensated in damages, and that your orator is without remedy save in a Court of Equity.

XI. Your orator further says that he was a share holder in the defendant company prior to the demand upon said defendant company to contest said tax and its refusal to do so as hereinbefore set forth and that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. Your orator has made every effort within his power to induce the officers and directors of the defendant company to oppose the enforcement of said Act of Congress as hereinbefore set forth and has failed to secure such action on their part by reason of their determination to the contrary, as hereinbefore set forth, and their declaration of such determination.

XII. Your orator further shows that this is a suit of civil nature in Equity and arises under the Constitution of the United States and under an Act of Congress of the United States providing for internal revenue.

7 Wherefore your orator prays as follows:

I. That a writ of subpœna may issue out of and under the seal of this honorable Court, directed to the defendant company, the Broadway Realty Company, and the individual defendants, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane requiring and commanding them and each of them to appear in this cause upon a day certain, to be therein named, and answer the several allegations in this Bill of Complaint contained; an answer under oath being expressly waived.

II. That it be adjudged and decreed that the said provisions for said tax, known as the Corporation Income Tax, contained in said Act of Congress of August 5th, 1909, are unconstitutional, null and void;

III. That the defendant company, its officers, agents, attorneys and servants, and the individual defendants, its directors, be perpetually enjoined and restrained from complying with the provisions

of said Act, and making the returns and statements and paying the tax required thereby, and that a preliminary injunction issue out of this Honorable Court enjoining and restraining said defendant company, its officers, agents, attorneys and servants, and the individual defendants, its directors, in like manner, until the further order of the Court.

IV. That your orator may have such other and further relief in the premises as may be just, including his costs.

And your orator will ever pray etc.

COUDERT BROTHERS,
Solicitors for Complainants, 2 Rector St., N. Y.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Of Counsel.

8 STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss:

Percy H. Brundage, being duly sworn says, I am the complainant herein and reside in the City of New York and State of New York and Southern District of New York. I have read the foregoing Bill of Complaint and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

PERCY H. BRUNDAGE.

Sworn to before me this 28th day of January 1910.
[SEAL.]
ROBERT C. SPENCE,
Notary Public, N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 28, 1910. John A. Shields, Clerk.

9 *Answer.*

In the Circuit Court of the United States, for the Southern District of New York.

In Equity.

PERCY H. BRUNDAGE, Complainant,
against
BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, GEORGE FOSTER PEABODY and GARDINER M. LANE, Defendants.

To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York.

The answer of the above named defendants, the Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, to the Bill of Complaint of the above

named complainant or such part thereof as these defendants are advised is material or necessary to be answered, respectfully shows to this Court.

I. Said defendants admit the allegations contained in paragraphs Numbered I, II, III, IV, V, VI, VII, XI, and XII of said Bill of Complaint.

II. They deny the allegations contained in the paragraph Numbered VIII of said Bill of Complaint, except that they admit that compliance with the Act of Congress therein mentioned and payment of the tax imposed by said Act will render the stock held by the complainant and by other stockholders similarly situated of less value.

III. Upon information and belief they deny the allegations contained in the paragraphs Numbered IX and X of said Bill of
10 Complaint, except that they admit that compliance with the Act of Congress therein mentioned and payment of the tax imposed by said Act will render complainant's stock in the defendant company of less value and less productive, and that said condition is a continuing one and that said diminution in value cannot be adequately measured in damages and that complainant has no remedy at law, but they deny that he is entitled to any relief either at law or in equity.

IV. And these defendants further answering, respectfully show to this Court that heretofore and prior to the making or filing of said bill of complaint it has been determined by the Board of Directors of the defendant company that the officers of said company furnish to the United States Collector of Internal Revenue for the Third District of New York the information requested by him and that the company and its officers comply in all respects with the Act of Congress imposing the tax mentioned and described in the Bill of Complaint, and that the defendant company pay said tax when ascertained; that said determination was made in good faith and with the intention of prompt and full compliance with said Act of Congress which these defendants are advised is constitutional.

V. And these defendants further answering, respectfully show to this Court that they are advised and believe that it is to the best interest of the defendant company and its stockholders that said Act should be complied with and the tax paid in accordance therewith and these defendants respectfully submit that said determination of the Board of Directors of the defendant company is legal and proper and that said Act is constitutional and that a failure on the part of the defendant company to comply therewith would subject the defendant company and its officers and directors to penalties
11 much greater in amount than the tax imposed by said Act.

Wherefore these defendants having fully answered to the Bill of Complaint, so far as they are advised that the same is material or necessary to be answered unto, deny that the complainant is entitled to the relief in said Bill of Complaint prayed for or any part thereof or any relief whatsoever and they pray that they may be hence dismissed with their costs and charges in this behalf sustained or that this Court render such judgment in the

premises as will protect these defendants and govern their future actions.

[SEAL.]

BROADWAY REALTY COMPANY,
CHAS. J. PEABODY, *Sec't'y;*
JOSEPH F. STIER,
CHARLES J. PEABODY,
GEORGE FOSTER PEABODY,
GARDINER M. LANE,
Defendants.

MASTEN & NICHOLS,
Solicitors for Defendants,
49 Wall St., N. Y.
GEORGE L. NICHOLS,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 28, 1910. John A. Shields, Clerk.

12 In the Circuit Court of the United States for the Southern District of New York.

PERCY H. BRUNDAGE, Complainant,
against
BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

Final Decree Dismissing Suit.

The above entitled cause, having been by order of Court set for final hearing upon the bill and answer herein, duly came on for such final hearing at a Stated Term of this Court held on the first day of February, 1910, and was argued by counsel, and the Court upon due consideration of said bill and answer and the arguments of counsel being of the opinion that the provisions of the act of Congress mentioned in said bill of complaint are constitutional, valid and effectual, doth now

Order, adjudge and decree that this suit be, and the same hereby is, dismissed upon the merits.

Dated, February first, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

13 United States Circuit Court, Southern District of New York.

PERCY H. BRUNDAGE, Complainant,
against
BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

Petition of Appeal.

To the Honorable James L. Martin, one of the Judges of the above named Court, presiding therein:

The above named complainant in the above entitled cause, Percy H. Brundage, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the first day of February, 1910, wherein and whereby it was ordered and adjudged that the above entitled suit be dismissed upon the merits, doth hereby appeal to the Supreme Court of the United States from the said order and decree and each and every part thereof, for the reasons set forth in the assignment of errors filed herewith, and he prays that this his petition for said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, February first, 1910.

COUDERT BROTHERS,
Solicitors for Complainant-Appellant,
#2 Rector Street, New York City, N. Y.

14 *Order Allowing Appeal.*

The foregoing petition of appeal is hereby granted and the appeal allowed as therein prayed.

Dated, February first, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

15 Circuit Court of the United States, Southern District of New York.

PERCY H. BRUNDAGE, Complainant,
against
BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

Assignment of Errors.

Comes now the complainant and appellant in the above entitled cause and files the following assignment of errors upon which he will rely upon his appeal from the decree made by this Honorable

Court on the first day of February, 1910, in the above entitled cause.

I. That said Court erred in adjudging that the provisions of the Act of Congress mentioned in the bill of complaint herein are constitutional, valid and effectual.

II. That the Court erred in not adjudging that said provisions of said Act of Congress are contrary to and inconsistent with and in violation of the Constitution of the United States and hence null, void and of no effect.

III. That said Court erred in dismissing this suit and complainant's said Bill of Complaint.

IV. That said Court erred in not granting a final decree in favor of the complainant as prayed in the said Bill of Complaint.

Wherefore the said Percy H. Brundage prays that said decree of the Circuit Court of the United States for the Southern District of New York be reversed, and that said Circuit Court be
16 directed to grant a decree in favor of complainant for the relief prayed in the said Bill.

Dated, February 1st, 1910.

COUDERT BROTHERS,
Solicitors for Complainant-Appellant,
#2 Rector Street, New York City, New York.

FREDERICK R. COUDERT,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

17 *Appeal Bond.*

Circuit Court of the United States, Southern District of New York.

PERCY H. BRUNDAGE, Complainant,
against
BROADWAY REALTY COMPANY, JOSEPH F. STIER, CHARLES J. PEABODY, George Foster Peabody and Gardiner M. Lane, Defendants.

Know all men by these presents, that we, Percy H. Brundage as principal and Frederic R. Coudert and Howard Thayer Kingsbury, as sureties, are held and firmly bound unto Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, in the just and full sum of $250.00/100 to be paid to the said Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, their legal representatives, successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this first day of February, in the year 1910.

Whereas lately at a session of the Circuit Court of the United States for the Southern District of New York in a suit pending in said Court between the said Percy H. Brundage as complainant and the said Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane as defendants a decree was rendered against the said Percy H. Brundage, dismissing his said suit, and the said Percy H. Brundage has obtained from said Court an order allowing an appeal to the Supreme Court
18 of the United States to reverse said decree and a citation directed to the defendants in said suit is about to be issued citing and admonishing them to be and appear at the said Supreme Court of the United States.

Now, the condition of the above obligation is such that if the said Percy H. Brundage shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him if he fail to make his plea good, then the above obligation is to be void otherwise to remain in full force and virtue.

PERCY H. BRUNDAGE.
By COUDERT BROTHERS, *Solicitors.*
FREDERIC R. COUDERT. [SEAL.]
HOWARD THAYER KINGSBURY. [SEAL.]

19 STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this first day of February, 1910, before me personally came Frederic R. Coudert and Howard Thayer Kingsbury to me known and known to me to be two of the individuals described in and who executed the foregoing instrument and duly and severally acknowledged to me that they executed the same.

[SEAL.] A. D. WEEKES, JR.,
Notary Public, Nassau Co.

Cert. filed in N. Y. Co. & Register's Office.

The foregoing bond is hereby approved as to form, amount and sufficiency of sureties.

Dated, February first, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

20 The President of the United States to Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia within thirty days from the date of this citation pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the

Southern District of New York, wherein Percy H. Brundage is appellant and you are appellees, to show cause if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this first day of February in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States the One hundred and thirty-fourth.

JAMES L. MARTIN,
U. S. Dist. Judge.

21 [Endorsed:] Eq. 5. 142. United States Circuit Court, Southern District of New York. Percy H. Brundage, Complainant, against Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody, and Gardiner M. Lane, Defendants. E. & A. D. 3059. Citation. Coudert Brothers, Sol'rs for Complainant, 2 Rector Street, Borough of Manhattan, New York. Due service of a copy of the within citation is hereby admitted this 2d day of February, 1910. Masten & Nichols, Solicitors for Defendants. U. S. Circuit Court, Southern District, N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

22 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to twenty-one inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Percy H. Brundage, Complainant-Appellant, against Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody and Gardiner M. Lane, Defendants-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of February, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Percy H. Brundage, Comp't-Appellant, vs. Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody, and Gardiner M. Lane, Defendants-Appellees. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,010. S. New York C. C. U. S. Term No. 784. Percy H. Brundage, appellant, vs. Broadway Realty Company et al. Filed February 8th, 1910. File No. 22,010.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910

No. 432

PAUL LACROIX, APPELLANT,

vs.

MOTOR TAXIMETER CAB COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 8, 1911.

(22,011)



(22,011)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 785.

PAUL LACROIX, APPELLANT,

vs.

MOTOR TAXIMETER CAB COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 10, 1910.

1 *Subpœna.*

The President of the United States of America to The Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewell, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray, and Henry D. Miller, Greeting:

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of February, A. D. 1910 wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Paul Lacroix, and do further receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, on the 28th day of December, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States of America, the one hundred and thirty-fourth.

JOHN A. SHIELDS, *Clerk.*

COUDERT BROTHERS,
Solicitors for Complainant.

2 The Defendants are required to enter appearance in the above cause, in the Clerk's Office of this Court, on or before the first Monday of February, 1910, or the bill will be taken *pro confesso* against them. J. A. S., *Clerk.*

(Endorsed:) Due service of the within Subpœna ad respondendum is hereby admitted this 28th day of December, 1909 by the within named defendant.—Harvey T. Andrews, Att'y for Defendants.—U. S. Circuit Court, Southern District N. Y. Filed Jan. 15, 1910. John A. Shields, Clerk.

3 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern District of New York.

In Equity.

PAUL LACROIX, Complainant,
against
MOTOR TAXIMETER CAB COMPANY, HENRY U. KIBBE, HENRY F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, Defendants.

To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York:

Paul Lacroix, of Paris, France, and a citizen of the French Republic, and a stockholder in the Motor Taximeter Cab Company,

brings this his bill of complaint in behalf of himself and all other stockholders who are similarly situated, and who shall be entitled to avail themselves of the benefit of this suit against the said Motor Taximeter Cab Company of the City of New York, a corporation organized and existing under the laws of the State of New York and an inhabitant of the Southern District of New York, and having its principal office in the said district, and Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll and Harvey T. Andrews,
all of the City of New York and citizens and inhabitants of
4 the State of New York and Southern District of New York,
John P. Murray, of Jersey City, and a citizen and inhabitant of the State of New Jersey and District of New Jersey, and Henry D. Miller, of Bridgeport, Connecticut, and a citizen and inhabitant of the State of Connecticut and District of Connecticut.

And thereupon your orator complains and says:

I. The defendant, the Motor Taximeter Cab Company (hereinafter styled the defendant company), is a corporation organized and existing under and by virtue of the laws of the State of New York and is a citizen and inhabitant of said State, and has its principal place of business at No. 249 West 64th Street, in the Borough of Manhattan, in the City of New York, in the Southern District of New York. The capital stock of said defendant company consists of one hundred and fifty thousand ($150,000) dollars, divided into fifteen hundred (1,500) shares of the par value of one hundred ($100) dollars each, of which nine hundred (900) shares have been issued to wit: four hundred (400) shares of preferred stock and five hundred (500) shares of common stock. Said defendant company is organized for profit and is engaged in the business of owning motor vehicles and leasing the same for hire. Such business is transacted and conducted wholly within the Borough of Manhattan, in the City and State of New York. Said defendant company owns forty-three (43) motor vehicles of the kind and style known as taxicabs and leases all of them for a stated and agreed rental to a single customer, the Renault Taxi Service, a corporation organized and existing under the laws of the State of New York and doing business in said State. The defendant company is engaged in no other business whatever and its entire income is exclusively derived from the
rental of said vehicles as aforesaid.

5 II. The net profits or income of the defendant company since January 1, 1909, have already exceeded the sum of five thousand ($5,000) dollars, and for the year ending December 31, 1909, as your orator is informed and verily believes, will exceed the sum of ten thousand ($10,000) dollars after deducting all expenses, charges, losses, depreciation, taxes, and interest paid out of or allowed against such income during said year. It has not received up to the present time and during the remainder of the year will not receive any dividends upon stock of other corporations, associations or companies whatever.

III. The defendants Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll and Harvey T. Andrews all reside in the City of New York and are citizens and inhabitants of the State of

New York and Southern District of New York. The defendant Henry D. Miller resides in Bridgeport, Connecticut, and is a citizen and inhabitant of the State of Connecticut and District of Connecticut. The defendant John P. Murray resides in Jersey City, New Jersey, and is a citizen and inhabitant of the State of New Jersey and District of New Jersey. The said individual defendants, together with Paul Lacroix, your orator, compose the Board of Directors of the defendant company.

IV. Your orator is and has been since the organization of the defendant company in 1908, the largest stockholder therein and is and has been the owner and registered holder of twenty-five (25%) per cent of the outstanding stock, to wit: One hundred and sixty (160) shares of the common stock of the par value of sixteen thousand ($16,000) dollars and of an actual value exceeding sixteen thousand ($16,000) dollars, and of sixty (60) shares of the preferred stock of the par value of six thousand ($6,000) dollars and of an actual value exceeding six thousand ($6,000) dollars. Your
6 orator is and has been since the 6th day of August, 1908, one of the directors of said defendant company.

V. By the certificate of incorporation of the said defendant, and by and under the laws of the State of New York, the management of the property and affairs and concerns of the defendant is committed to its Board of Directors. The majority of said Board of Directors claim and assert that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States, entitled "An Act to provide revenue, to equalize duties and encourage the industries of the United States, and for other purposes," enacted on or about the 5th day of August, 1909, said defendant company is, or will be liable to pay to the United States on or before the 30th day of June, 1910, a tax of one percentum upon the entire net income, over and above the sum of $5,000 received by said defendant from all sources during the year ending December 31st, 1909, computed as provided in said act and otherwise to comply with the provisions of said act.

VI. Said defendant company has received since on or about the 17th day of November, 1909, repeated notices from the United States Collector of Internal Revenue for the Third District of New York, calling upon the defendant company to furnish certain information intended to facilitate said Collector and the other taxing authorities of the United States in the imposition, assessment and collection of the tax mentioned and set forth in said Act of Congress. At a meeting of the Board of Directors of said defendant company, held at its principal office on the 18th day of November, 1909, it was resolved by a majority vote that the officers of the company furnish said Collector of Internal Revenue with the information re-
7 quested, and *many* any and all such reports as such Collector or any other revenue officers of the United States Government may request, and that the company and its officers comply in all respects with said Act of Congress and pay the tax imposed thereby whenever the same shall have been ascertained and shall have become due and payable.

VII. Your orator was present at said meeting and opposed the passage of said resolution and the taking by the company and its officers of the action thereby provided for, upon the ground that said Act of Congress, and the said tax sought to be imposed thereby, were contrary to the Constitution of the United States and therefore void and of no effect, and voted against said resolution, and contended that the company and its officers should refuse to comply with said Act and should take all such measures as might be available to contest the validity of said Act and to oppose its enforcement, and resist the imposition, assessment and collection of said tax, and should refuse to furnish the information and make the return provided for by the said Act.

VIII. Your orator is informed and verily believes that the defendant company and its officers and directors intend to comply with said Act, and make and file the return required thereby and pay the tax imposed thereby, and that such action on their part, in the payment of a void and unconstitutional tax, will unlawfully divert a portion of the funds of said defendant, and will thereby render the stock held by your orator and by other stockholders similarly situated of less value.

IX. Your orator charges that the provisions in respect of said tax, contained in said Act of Congress, are unconstitutional, null and void, in that the said tax, although described in said Act as a Special Excise Tax, is in fact and in legal effect a direct tax upon the property held and owned by the defendant, which direct
8 tax is not in and by said Act apportioned among the several States, as required by the Constitution of the United States; and that if said tax should be held not to be a direct tax, nevertheless said provisions of said Act are unconstitutional, null and void, in that said tax is not uniform throughout the United States as required by the United States Constitution, but applies only to corporations organized and doing business for profit, and not to individuals or partnerships doing the same or similar business for profit; and further in that the tax impairs property rights vested prior to the passage of said Act of Congress, and is imposed upon and in respect of incomes which accrued prior to the date upon which said Act was passed and approved; and further in that the subject matter of said tax, to wit, the doing of business for profit by a corporation, is not within the taxing power of the United States, and that such tax is an invasion of the rights and prerogatives of the several States. Your orator further charges that the provisions in said Act in respect to the reports and returns to be made by corporations thereunder, and directing that such returns shall be public records open to inspection, violate the constitutional prohibition against unreasonable searches, and that thereby the defendant company and every corporation similarly situated may be compelled to produce and disclose their private books and papers in order to make them liable for a penalty or a forfeiture of their property, and that said Act is in other respects unconstitutional and void.

X. Your orator further sets forth that if the defendant company proceeds, as threatened, to comply with said Act of Congress, and

make the returns and pay the tax required thereby, such action on its part will render your orator's stock in said corporation of less value and less productive, and that such injury is a continuing one, and one which cannot be adequately compensated in damages, and that your orator is without remedy save in a Court of Equity.

XI. Your orator further sets forth that he was a shareholder in the defendant corporation prior to the passage of said Act of Congress, and that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. Your orator has made every effort within his power to induce the other Directors of the defendant corporation to oppose the enforcement of said Act of Congress, as hereinbefore set forth, and has failed to secure such action on their part by reason of the majority vote of said Directors to the contrary hereinbefore mentioned.

XII. Your orator further shows that this is a suit of a civil nature in equity and arises under the Constitution of the United States and under an Act of Congress of the United States providing for internal revenue, and that it is furthermore a controversy between a foreign citizen, to wit, a citizen of the French Republic, and citizens of the States of New York, Connecticut and New Jersey.

Wherefore your orator prays as follows:

1. That a writ of subpœna may issue out of this Honorable Court directed to the defendant company, The Motor Taximeter Cab Company, and the defendants, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, requiring and demanding them and each of them to appear in this cause, upon a day to be therein named, and answer the several allegations in this bill of complaint contained; an answer under oath being hereby expressly waived.

2. That it be adjudged and decreed that the said provisions for said tax, known as the Corporation Income Tax, contained in said Act of Congress of August 5th, 1909, are unconstitutional, null and void.

3. That the defendant company, its officers, agents, attorneys and servants, and the individual defendants, its directors, be perpetually enjoined and restrained from complying with the provisions of said Act, and making the returns and statements and paying the tax required thereby, and that a preliminary injunction issue out of this Honorable Court enjoining and restraining said defendant company, its officers, agents, attorneys and servants, and the individual defendants, its directors, in like manner, until the further order of the Court.

4. That your orator may have such other and further relief in the premises as may be just, including his costs.

And your orator will ever pray, etc.

COUDERT BROTHERS,
Solicitors for Complainant, 2 Rector Street, N. Y.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Of Counsel.

11 STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss:

Paul Lacroix, being duly sworn, says: I reside in Paris, France, and am temporarily sojourning in the City of New York. I am the complainant herein; I have read the foregoing bill of complaint and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

PAUL LACROIX.

Sworn to before me this 27th day of December, 1909.
CHAS. A. CONLON,
Notary Public, New York Co.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Dec. 28, 1909, John A. Shields, Clerk.

Appearance.

United States Circuit Court, Southern District of New York.

In Equity.

PAUL LACROIX, Complainant,
against
MOTOR TAXIMETER CAB COMPANY, HENRY U. KIBBE, HENRY F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry O. Miller, Defendants.

To the Clerk U. S. Circuit Court:

Please enter and file my appearance as Solicitor and Counsel for all of the above named defendants in the above entitled suit.

Dated New York, Jan. 15th, 1910.

HARVEY T. ANDREWS,
Solicitor for Defendants, 2 Rector Street, New York City, N. Y.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 15, 1910. John A. Shields, Clerk.

12 *Answer.*

In the Circuit Court of the United States, for the Southern District of New York.

PAUL LACROIX, Complainant,
against
MOTOR TAXIMETER CAB COMPANY, HENRY U. KIBBE, HENRY F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry O. Miller, Defendants.

To the Honorable, the Judges of the Circuit Court of the United States, in and for the Southern District of New York:

The answer of the above-named defendants, Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas

M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, to the bill of complaint of the above-named complainant, or such part thereof as defendants are advised is material or necessary to be answered, respectfully shows to this Court:

I. Said defendants admit the allegations contained in paragraphs numbered I, II, III, IV, V, VI and the first paragraph numbered "VII" of said bill of complaint.

II. They deny the allegations contained in the second paragraph numbered "VII" (apparently intending VIII), except that it was and is the intention of these defendants to comply with the Act of Congress mentioned therein and to make and file the return required thereby.

13 III. They deny upon information and belief the allegations or conclusions set forth in paragraph IX of said bill of complaint, wherein it is alleged that the provisions relating to the tax contained in the said Act of Congress are unconstitutional, null and void.

IV. These defendants further deny, upon information and belief, the allegations or conclusions contained in paragraph X of said bill of complaint to the effect that if the defendant company complies with the said Act of Congress, and makes the return and pays the tax required thereby, said action will result in a continuing injury and render the orator's stock of less value. They admit that complainant has no remedy at law, but they deny he is entitled to any relief either at law or in equity.

V. Said defendants admit the allegations contained in paragraphs XI and XII of said bill of complaint.

VI. And these defendants further answering respectfully show to this Court, that heretofore and at or about the date mentioned in the bill of complaint, to wit, the 18th day of November, 1909, at a regular meeting of the Board of Directors of the above-named defendant company, a resolution was passed by a majority vote that the officers of the company furnish the Collector of Internal Revenue with the information requested by him and that the company and its officers comply in all respects with the Act of Congress imposing the tax mentioned and described in the bill of complaint, and that the company should pay the same when ascertained; that the said resolution was passed and said action taken in good faith, and with the view of prompt and regular compliance with an Act of Congress which these defendants believed and still believe to be constitutional,

14 and that it was for the best interests of the defendant company and its stockholders that the said law should be complied with and the tax paid in accordance therewith, and these defendants respectfully submit that the aforesaid action of the Board of Directors of the defendant company is legal and proper, and that the said law is constitutional, and that a failure on the part of the defendant company to comply therewith would subject the said company and its officers and directors to penalties much greater in amount than the tax imposed by said Act.

Wherefore, these defendants having fully answered the bill of complaint as far as they are advised the same is material or necessary

to be answered, deny that the complainant is entitled to the relief or any part thereof in said bill of complaint demanded, or any relief whatsoever; and pray that the said bill of complaint be dismissed with costs, or that this Court render such judgment in the premises as will protect these defendants and govern their future action.

MOTOR TAXIMETER CAB CO.
By HENRY F. SEWALL,
Treasurer. [SEAL.]

HARVEY T. ANDREWS,
Solicitor for Defendants, Office & P. O.
Address, No. 2, Rector St., New York City.

15 UNITED STATES OF AMERICA,
State and County of New York,
Southern District of New York, ss:

Henry F. Sewall being duly sworn, says: that he is the Treasurer of the Motor Taximeter Cab Company, a corporation formed under and existing under the laws of the State of New York, and one of the defendants in the above-entitled action, and is personally familiar with all of the facts and circumstances constituting the subject matter of this action. That the foregoing answer is true to his own knowledge except as to those matters stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the reason this verification is made by deponent and not by said defendant corporation is that the defendant is a corporation and this deponent is an officer thereof, to wit, the Treasurer, and is fully acquainted with the facts and circumstances relating to the matters in controversy.

HENRY F. SEWALL, *Treasurer.*

Sworn to before me this 7th day of January, 1910.
[SEAL.] WILLIAM BARNES,
Notary Public, New York County.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan. 15, 1910. John A. Shields, Clerk.

16 United States Circuit Court, Southern District of New York.

PAUL LACROIX, Complainant,
against
MOTOR TAXIMETER CAB COMPANY, HENRY U. KIBBE, HENRY F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, Defendants.

Final Decree Dismissing Suit.

The above-entitled cause, having been by order of Court set for final hearing upon the bill and answer herein, duly came on for such final hearing at a Stated Term of this Court held on the first

day of February, 1910, and was argued by counsel, and the Court upon due consideration of said bill and answer and the arguments of counsel being of the opinion that the provisions of the act of Congress mentioned in said bill of complaint are constitutional, valid and effectual, doth now

Order, adjudge and decree that this suit be, and the same hereby is, dismissed upon the merits.

Dated, February first, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

17 Circuit Court of the United States, Southern District of New York.

PAUL LACROIX, Complainant,
against
MOTOR TAXIMETER CAB COMPANY, HENRY U. KIBBE, HENRY F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, Defendants.

Petition of Appeal.

To the Honorable James L. Martin, one of the Judges of the above named Court, presiding therein:

The above named complainant in the above entitled cause, Paul Lacroix, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the first day of February, 1910, wherein and whereby it was ordered and adjudged that the above entitled suit be dismissed upon the merits, doth hereby appeal to the Supreme Court of the United States from the said order and decree and each and every part thereof, for the reasons set forth in the assignment of errors filed herewith, and he prays that this his petition for said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, February first, 1910.

COUDERT BROTHERS,
Solicitors for Complainant-Appellant,
#2 Rector Street, New York City, New York.

18 *Order Allowing Appeal.*

The foregoing petition of appeal is hereby granted and the appeal allowed as therein prayed.

Dated, February first, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

19 Circuit Court of the United States, Southern District of New York.

PAUL LACROIX, Plaintiff,

against

MOTOR TAXIMETER CAB COMPANY, HENRY U. KIBBE, HENRY F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, Defendants.

Assignment of Errors.

Comes now the complainant and appellant in the above entitled cause and files the following assignment of errors upon which he will reply upon his appeal from the decree made by this Honorable Court on the first day of February, 1910, in the above entitled cause.

I. That said Court erred in adjudging that the provisions of the Act of Congress mentioned in the bill of complaint herein are constitutional, valid and effectual.

II. That the Court erred in not adjudging that said provisions of said Act of Congress are contrary to and inconsistent with and in violation of the Constitution of the United States and hence null, void and of no effect.

III. That said Court erred in dismissing this suit and complainant's said Bill of Complaint.

IV. That said Court erred in not granting a final decree in favor of the complainant as prayed in the said Bill of Complaint.

Wherefore the said Paul Lacroix prays that said decree of the Circuit Court of the United States for the Southern District of New York be reversed, and that said Circuit Court be directed to
20 grant a decree in favor of complainant for the relief prayed in the said Bill.

Dated, February 1st, 1910.

COUDERT BROTHERS,
Solicitors for Complainant-Appellant,
#2 Rector Street, New York City, New York.

FREDERIC R. COUDERT,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

21 *Appeal Bond.*

Circuit Court of the United States, Southern District of New York.

PAUL LACROIX, Complainant,
against
MOTOR TAXIMETER CAB COMPANY, HENRY U. KIBBE, HENRY F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, Defendants.

Know all men by these Presents, that we, Paul Lacroix as principal and Frederic R. Coudert and Howard Thayer Kingsbury, as sureties, are held and firmly bound unto Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller in the just and full sum of $250.00 to be paid to the said Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray, and Henry D. Miller, their legal representatives, successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 1st day of February, in the year 1910.

Whereas lately at a session of the Circuit Court of the United States for the Southern District of New York in a suit pending in said Court between the said Paul Lacroix as complainant and the said Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. An-

22 drews, John P. Murray and Henry D. Miller as defendants, a decree was rendered against the said Paul Lacroix, dismissing his said suit, and the said Paul Lacroix has obtained from said Court an order allowing an appeal to the Supreme Court of the United States to reverse said decree and a citation directed to the defendants in said suit is about to be issued, citing and admonishing them to be and appear at the said Supreme Court of the United States.

Now, the condition of the above obligation is such that if the said Paul Lacroix shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him if he fail to make his plea good, then the above obligation is to be void, otherwise to remain in full force and virtue.

PAUL LACROIX.
By COUDERT BROTHERS, *Solicitors.*
FREDERIC R. COUDERT. [SEAL.]
HOWARD THAYER KINGSBURY. [SEAL.]

23 STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this First day of February, 1910, before me personally came Frederic R. Coudert and Howard Thayer Kingsbury to me known

and known to me to be two of the individuals described in and who executed the foregoing instrument and duly acknowledged to me that they executed the same.

[SEAL.]

A. D. WEEKES, JR.,
Notary Public, Nassau Co.

Cert. Filed in N. Y. Co. & Register's Office.

The foregoing bond is hereby approved as to form, amount and sufficiency of sureties.

Dated, February, 1st, 1910.

JAMES L. MARTIN,
U. S. Dist. Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 2, 1910, John A. Shields, Clerk.

24 The President of the United States to Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington in the District of Columbia within thirty days from the date of this citation pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Paul Lacroix is appellant and you are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this first day of February, in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States the One hundred and thirty-fourth.

JAMES L. MARTIN,
U. S. Dist. Judge.

25 [Endorsed:] Eq. 5. 109. United States Circuit Court, Southern District of New York. Paul Lacroix, Complainant, against Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray, and Henry D. Miller, Defendants. E. & A. D. 3060. Citation. Coudert Brothers, Sol'rs for Complainant, 2 Rector Street, Borough of Manhattan, New York. Due service of a copy of the within citation is hereby admitted this 2d day of February, 1910. Harvey T. Andrews, Solicitor for defendants. U. S. Circuit Court, Southern District, N. Y. Filed Feb. 2, 1910. John A. Shields, Clerk.

26 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to twenty-five inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Paul Lacroix, Complainant-Appellant, against Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of February, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States Supreme Court. Paul Lacroix, Compl't-Appellant, vs. Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, Def'ts-Appellees. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,011. S. New York C. C. U. S. Term No. 785. Paul Lacroix, appellant, vs. Motor Taximeter Cab Company et al. Filed February 8th, 1910. File No. 22,011.

Office Supreme Court, U. S.
FILED.
FEB 21 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM 1909 NO. ~~781~~ 434

PERCY H. BRUNDAGE,
Appellant,

vs.

BROADWAY REALTY COMPANY and others,
Appellees.

Motion to Advance.

Now come the appellant, Percy H. Brundage, by Frederic R. Coudert his counsel, and the appellees Broadway Realty Company, Joseph F. Stier, Charles J. Peabody, George Foster Peabody, and Gardiner M. Lane, by George L. Nichols, their counsel, and respectfully move the Court to advance the above entitled cause upon the docket and set it down for hearing on March 14th, 1910, or such other early day as shall be most convenient to the Court and satisfactory to the Attorney General, on the ground that this is a revenue case in which the United States are concerned and which involves a matter of general public interest, to wit, the constitutionality, construction and application of those provisions of the Act of Congress of the United States entitled "An Act to provide

revenue, to equalize duties and encourage the industries of the United States and for other purposes" enacted on or about August 5th, 1909, providing for the imposition and collection of an annual tax upon the income of corporations, associations and insurance companies, commonly known as the "Corporation Income Tax Law."

This cause is a suit in Equity brought by Percy H. Brundage, the complainant and appellant, in the Circuit Court of the United States for the Southern District of New York against the Broadway Realty Company, (a corporation in which the said Percy H. Brundage is a stockholder), and the individual defendants and appellees, who constitute the Board of Directors of the said Broadway Realty Company, to restrain the defendants from complying with the said Act of Congress and making the return required and paying the tax imposed thereby, upon the ground that said provisions of said Act of Congress are unconstitutional.

By a special order of Court dated January 28th, 1910, this cause was set for hearing on bill and answer on February 1st, 1910, and was heard upon that day, and the Court thereupon on the same day made a decree adjudging that the said Act of Congress is constitutional and dismissing the suit upon the merits. An appeal to this Court was immediately taken and allowed and this cause is now No. 784 upon the docket of this Court.

The procedure followed and the questions involved in this case are the same as in the case of Paul Lacroix *vs.* Motor Taximeter Cab Company, No. 785 October Term 1909, a motion to advance which will be made simultaneously here-

with, except that in the present case the income of the defendant corporation is derived principally from the rental of real property and the remainder from interest and dividends upon certain securities. The same reasons for advancing the cause upon the docket exist in both cases and it is desired that they should be heard together.

Dated, New York, February 21st, 1910.

FREDERIC R. COUDERT,
Counsel for Appellant.

GEORGE L. NICHOLS,
Counsel for Appellees.

Office Supreme Court, U. S.
FILED.
FEB 21 1910
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States,

OCTOBER TERM 1909 NO. ~~1909~~ 742

PAUL LACROIX,
Appellant,

vs.

MOTOR TAXIMETER CAB COMPANY, and others,
Appellees.

Motion to Advance.

Now come the appellant, Paul Lacroix, by Frederic R. Coudert his counsel, and the appellees Motor Taximeter Cab Company, Henry U. Kibbe, Henry F. Sewall, Paul E. Rasor, Thomas M. Carroll, Harvey T. Andrews, John P. Murray and Henry D. Miller, by Harvey T. Andrews, their counsel, and respectfully move the Court to advance the above entitled cause upon the docket and set it down for hearing on March 14th, 1910, or such other early day as shall be most convenient to the Court and satisfactory to the Attorney General, on the ground that this is a revenue case in which the United States are concerned and which involves a matter of general public interest, to wit, the constitutionality, construction and application of those provisions of the Act of Congress of the United States entitled "An Act to

provide revenue, to equalize duties and encourage the industries of the United States and for other purposes" enacted on or about August 5th, 1909, providing for the imposition and collection of an annual tax upon the income of corporations, associations and insurance companies, commonly known as the "Corporation Income Tax Law."

This cause is a suit in Equity brought by Paul Lacroix, the complainant and appellant, in the Circuit Court of the United States for the Southern District of New York against the Motor Taximeter Cab Company, (a corporation in which the said Paul Lacroix is a stockholder and Director), and the individual defendants and appellees, who are the other members of the Board of Directors of the said Motor Taximeter Cab Company, to restrain the defendants from complying with the said Act of Congress and making the return required and paying the tax imposed thereby. The procedure followed in this case is the same as that adopted in the case of Pollock *v.* Farmers' Loan & Trust Company, 157 U. S. 429 and 158 U. S. 601. The Bill of Complaint sets forth that the said Act of Congress is unconstitutional in that the tax sought to be imposed thereby is in fact and in legal effect a direct tax upon the property held and owned by the defendant and is therefore void because not apportioned among the several States, and that said tax is not uniform throughout the United States, and impairs property rights vested prior to the passage of said Act of Congress, and is sought to be imposed upon a subject matter not within the taxing power of the United States, and is an invasion of the rights and prerogatives of the several States, and that said Act is unconstitutional in other respects, and

that the payment of said unconstitutional tax will 7
unlawfully divert a portion of the defendant corporation's funds and will render the stock thereof held by the appellant of less value.

To this Bill of Complaint the defendants interposed an answer expressly admitting all the allegations of fact in the Bill, but setting forth that the said Act of Congress is constitutional and that the defendant corporation and the individual defendants, its directors, are bound to comply therewith.

By a special order of Court dated January 18th, 1910, the cause was set for hearing on Bill and 8
Answer on February 1, 1910, and was heard upon that day, and the Court thereupon on the same day made a decree adjudging that the said Act of Congress is constitutional and dismissing the suit upon the merits. An appeal to this Court was immediately taken and allowed and this cause is now No. 785 upon the docket of this Court.

The Act of Congress in question requires that the return to be made by corporations thereunder shall be filed not later than March 1st next and that the tax shall be assessed on or before June 1st and paid on or before June 30th, and imposes heavy penalties for failure to comply therewith. 9
Unless the question of the constitutionality of said Act is speedily determined, all corporations must either disclose their private affairs in a report which said Act declares shall constitute a public record and be open to inspection as such, and pay a heavy and burdensome tax, which can be recovered back only with difficulty and expense in case the Act is determined to be unconstitutional, or if such corporation fail or refuse to

comply with said Act, they must incur heavy penalties in the event that the Act shall be determined to be constitutional.

In the case of the defendant corporation, all of its income is derived from the rental of personal property and the tax falls entirely upon such income. Such a tax was held by this Court in Pollock *v.* Farmers' Loan & Trust Company, 157 U. S., 429 and 158 U. S., 601, to be a direct tax and hence subject to the rule of apportionment. It was also held by this Court in Spreckels Sugar Refining Company *v.* McClain, 192 U. S., 397, that income so derived should not be included in measuring the amount of income upon which a tax on business was imposed. This cause presents the question whether these rules apply to the tax imposed by the Act of August 5th, 1909.

Other objections to the constitutionality of the Act are also involved in this cause.

The questions presented are of great public importance and it is a matter of great urgency for the business interests of the entire country that they should be speedily determined.

Dated New York, February 21st, 1910.

FREDERIC R. COUDERT,
Counsel for Appellant.

HARVEY T. ANDREWS,
Counsel for Appellees.

FILED
MAR 8 1910
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

~~431~~ 432

Nos. ~~784~~ and ~~785~~.

PERCY H. BRUNDAGE, *Appellant,* *against* BROADWAY REALTY COMPANY, et al.	No. 784.
PAUL LACROIX, *Appellant,* *against* MOTOR TAXIMETER COMPANY, et al.	No. 785.

BRIEF FOR APPELLANTS.

FREDERIC R. COUDERT,
Counsel for Appellants,
No. 2 Rector Street,
New York.

Supreme Court of the United States,

OCTOBER TERM, 1909.

Nos. 784 and 785.

PERCY H. BRUNDAGE, Appellant, AGAINST BROADWAY REALTY COMPANY, *et al.*	No. 784.
PAUL LACROIX, Appellant, AGAINST MOTOR TAXIMETER CAB COMPANY, *et al.*	No. 785.

BRIEF FOR APPELLANTS.

Statement.

These two cases involve the sole point of the Constitutionality of the Federal Corporation Income Tax Law of 1909.

In both cases the suits are brought in equity by a stockholder to enjoin the making of the returns required by the statute, and the payment of the tax on the net corporate income, by the officers and directors of the companies. In each case answers were interposed admitting the allegations of the complaint that the officers and directors of the companies intended to comply in all re-

spects with the law, but denying its unconstitutionality, and thus raising the question of the validity of the law. The Circuit Court by rendering judgment on the pleadings in favor of the defendants formally sustained the constitutionality of the law.

In the Lacroix case (785) the sole business of the defendant company consists in the owning and renting of motor vehicles. It derives income from no other source than the rent on the said vehicles (Rec. fol. 4).

In the Brundage case (784) the sole business of the company and the purpose for which it is organized is the holding and managing of real estate. It owns an office building in the City of New York, and also certain securities. Its business consists in collecting the rents of such buildings and the income from said securities. It has no other business and its income consists wholly of the direct proceeds of such real estate and personal property.

Specification of Errors.

The complainant stockholder claims that the law is unconstitutional:

(1) as an unwarranted assumption of a power not possessed by Congress, and

(2) even if generally constitutional as to corporations engaged in ordinary business or occupations, as having no valid application to corporate income derived solely from the rent of real or personal property.

The soundness of these contentions is the sole question raised by the assignment of errors.

Introduction.

All constitutional questions are grave and important. To insist upon this is to comment upon the obvious, but there are degrees of importance, even in regard to such questions. Whether a matter enters into the domain of Interstate Commerce or falls within the scope of some other enumerated power of the Federal Government may

mean much to individuals or communities, but cannot fundamentally affect the general form of constitutional Federal Government under which our nation has lived since its beginning. Such cases involve merely the interpretation of certain clauses of the constitution and their application to a particular state of facts, but the decision cannot alter the great general lines laid down implicity or expressly in our constitution. In terms of logic the extension of our constitutional principles remains thereby unchanged; only their intention can be affected.

Another and rarer class, however, is far more important and far reaching in its effects because the very existence of the basic principles themselves is brought into question.

Such was the situation confronting John Marshall and his colleagues on the bench of this Court in the early years of the Nineteenth Century when the case of McCulloch *v.* Maryland was called for argument. A decision in favor of the State of Maryland would have involved the annihilation by judicial construction of the great plan of the fathers for a government based upon the real federal principle of an indissoluble union of indestructable States, with each Government in its respective orbit independent of the other, because the Constitution framed by the sovereign people back of both governments had ordained that neither government (State or Federal) should possess the power, under the guise of taxation or otherwise, of fettering or destroying the powers reserved to the other. Such a decision by this Court in that *cause célèbre* would have meant a long step backward to that other and older kind of Federalism which had so justly gone into bankruptcy and disrepute under the articles of confederation; a Federalism in name only, in fact a temporary alliance of sovereign States whose central agent was a governmental instrument with no independent existence save at the will of sovereign States whose autonomous powers were not counter-balanced by another Government equally indestructible.

History never exactly repeats itself,—but in the movement of civilization striking parallels occur. When the State of Maryland attempted to tax the Bank of the United States, the Federal Government was weak, the federal principle evolved after so many failures was viewed with suspicion, and the danger to the nation's life came from the spirit of particularism which was loath to recognize that common institutions, language and traditions had united the thirteen Colonies into a national entity. State rights then meant in final analysis a condition of feebly languishing political existence such as Germany endured for centuries, until under the heel of foreign domination the national idea prevailed over that of "State Rights."

The Judges of this Court, seconded by that greatest of the world's forensic figures, Daniel Webster, were at length able to foster and develop a national sentiment, which, finally emerging triumphant from the Civil War, permitted us to realize the ideas of the founders in an indestructible union of indestructible States.

The pendulum of the human movement then begins to swing the other way. The federal system is no longer threatened by the encroaching power of the States upon the Federal Government, but the latter begins to encroach upon the States, and one of the two necessarily co-existing factors in the indestructible union is again threatened;—to-day it is the autonomy of the States.

In the Slaughter House cases and the Civil Rights cases, this Court protected the rights of the States against the new nationalism, as in the older day it had saved the central government against the old particularism. Yet the centralizing movement continues, and the new or *pseudo-nationalism*, owing to economic causes and social pressure, is now striving by even greater centralization to effect social reforms deemed by many of its advocates of more importance than the retention of the old landmarks which distinguish our constitutional system. As the abolitionists preferred the destruction of the constitution to the continuance of slavery, so those who fear

the powers of corporate capital to-day advocate and sometimes enact alleged remedies dislocative of our constitutional limitations under the plea of curbing growing and aggressive wealth.

This popular sentiment has now culminated in the present Corporation Income Tax law, which enacted in times of piping peace and great prosperity has, as shown by its genesis, history, and very plain terms, the one purpose of placing the supervision of the main portion of the business activity of the nation in the hands of the Federal Government and of exercising a power of taxation which admittedly involves the possible destruction of functions, activities and privileges which are and always have been within the exclusive control of the State. That such was its primary object its sponsors have not hesitated to emphatically declare.

The consideration of the wisdom of such a course is not here involved.

The question is whether this law is compatible with the federal system as understood by the Framers and expounded by this Court from the very beginning of the Government. From the nature of this system is derived that initial limitation upon the power of taxation, concerning which Marshall said, "the security against abuse of this power, is found in the structure of the government itself." (Wheat., 428.)

The weight of a question is in nowise enhanced by length of argumentation and in the following brief the endeavor is made to set out in succinct fashion the principles which Counsel believe applicable in view of the decisions of this Court. Shortness of statement is frequently easier in regard to fundamental questions than in matters turning merely upon the doubtful interpretation of statutes or the analysis of a long line of cases upon technical questions.

Counsel intend this brief to be in fact as in name a "brief," and well known cases will not be quoted at tedious length.

Summary of Appellants' Contentions.

I.

The tax is imposed, and falls, upon the right or franchise granted by the State to be a corporation. It is a true corporation tax and was so intended.

II.

The tax is invalid because violative of the fundamental constitutional principle that neither State nor Federal Government may tax one of the instrumentalities, or powers, of the other, since such taxation involves the possibility of the destruction by one Government of those functions reserved exclusively to the other, and would thus be destructive of the federal principle.

III.

Even assuming *arguendo* the tax not to be invalid as falling upon a power reserved to the States, yet in this class of cases it is invalid as falling upon income derived from real and personal property, and as such is a direct tax not levied by apportionment, hence necessarily violating the specific Constitutional prohibition. (Art. 1, Sec. 8.)

IV.

The tax is violative of the "due process clause" in that it is in form only a tax, but in effect an attempt to regulate matters of exclusive State concern, and is further unlawfully discriminatory against one class of persons, viz. corporations.

POINTS.

I.

The tax is one upon the franchise or right to be a corporation granted by the State.

At the threshold comes the inquiry: Upon what does this tax fall? What is its incidence? The answer to this must be sought in the nature of the tax itself and not in the terminology by which Congress may have sought to classify it. Judicial decisions amply recognize that even legislative *fiat* cannot change *"la nature des choses"* and that neither the laws of human reason nor of economic classification can be defied, even by a Congressional majority (178 U. S., p. 41).

The Act of Congress itself attempts to classify the tax, and the terms of the law, as well as the expressions of the members who took part in the debates, show that it was hoped to dodge grave constitutional questions by classing the tax as an "excise on business or occupation."

The language of the law is

> "That every corporation, etc., organized under the laws of the United States or of any State or Territory of the United States, etc., *shall be subject to pay annually a special excise tax with respect to the carrying on, or doing business by such corporation, etc.*"

The Senatorial debates (Cong. Record, July 1 and 2, 1909) show that there was great divergence of view as to the validity of the tax, the advocates of its constitutionality resting upon the proposition that it was an excise tax on business similar to that sustained in the case of Spreckels *v.* McClain, 192 U. S., p. 397. An examination of the law itself and of the decisions of this Court amply demonstrates, however, that the tax is *on all corporate franchises* and thus easily to be dis-

tinguished from the excise on a particular business sustained in the Spreckels case.

The tax is not on corporations and individuals, *i. e.*, all persons, engaged in business (as was the case in the War Revenue Law, passed upon in the Spreckels case) *but on all corporations, whatever their business*, excepting some charitable corporations usually exempt from taxation on general grounds of public policy and humanity. It cannot be answered as to this that the tax *is only on business done by corporations*, because a corporation having no revenue from business is subject to the tax in as much as it strikes "the entire income *received by it from all sources during such year*, and in the case of foreign corporations, the income received from business transactions and *capital invested* within the United States, etc." Thus a reading of the statute shows the pharse "with respect to the carrying on or doing business," to be a mere attempt by means of a fictitious label to misclassify a general tax on all corporations as a business excise rather than as a franchise tax. "Neither the State Courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect." (Galveston, etc., Co. *v.* Texas, 210 U. S., p. 227.) The plain purpose of the statute is to tax every corporation in the United States. The few exceptions in favor of eleemosynary institutions are of no consequence save as emphasizing the intrinsically far reaching and comprehensive nature of the tax.

The history of the taxation of corporations establishes that the modern corporation tax is one wholly differing in its origin and nature from the excise tax on consumption or business, as found in English and American tax law.

The general Corporation tax is a very modern device. The first State to enact it was Pennsylvania in 1824. Since then it has been largely adopted by other States. To attempt to class this tax with the special excise on business is to ignore history.

Moverover the Congressional debates and contemporaneous history can leave no doubts on this point. A considerable agitation in favor of an income tax, the utterances of prominent leaders of public opinion, the declarations of party platforms had led to a belief that Congress would do something in the way of imposing a very general tax on income. The proceedings in Congress and out of it indicate that the question finally resolved itself into whether that body would pass another general income tax, thus again raising the questions decided in the Pollock case, or whether it would be contented with some substitute? This situation is graphically disclosed in the superlatively skillful speech of the junior Senator from New York (July 1, 1909), advocating the adoption of this law as a substitute for a general income tax upon the ground that the decision in the Pollock case would make the passage of an income tax of the same character seem an affront to the Supreme Court, and that furthermore no such course was necessary at the present day, as the great bulk of the business of the country was carried on by corporations, so that a tax upon corporate incomes would be almost as lucrative as and much more just than a general income tax-falling upon all persons.

As the learned Senator with a frankness not always found in legislative halls said:

> "Gentlemen may say that I am for the Corpora-
> "tion Tax to beat the Income Tax. I care not. I
> "am for the Corporation tax, because I think it is
> "better policy, better patriotism, higher wisdom than
> "the general income tax at this time and under these
> "circumstances. * * * The general income tax
> "provision includes, *first, substantially the same*
> "*tax upon the business of corporations which is in-*
> "*cluded in the measure recommended by the Presi-*
> "*dent.* * * * *The Corporation tax includes the*
> "*same tax upon Corporations without the individual*
> "*tax, etc.* * * * Mr. President, it has so hap-
> "pened that in the development of the business of

"the United States, the natural laws of trade have "been making the distinction for us, and they have "put the greater part of the accumulated wealth of "the country into the hands of Corporations, so that "when we tax them, we are imposing the tax upon "the accumulated income and relieving the earnings "of the men who are gaining a subsistence for their "old age and for their families after them."

To characterize the tax as an occupation or business excise is to pervert history. Such taxes are a special class common in England and the United States. (Dowell's History of Taxation, also Patten *v.* Brady, 184 U. S., p. 608; Nicol *v.* Ames, 173 U. S., 509; Thomas *v.* U. S., 192 U. S., 363; Chesebrough *v.* U. S., 192 U. S., p. 253).

A glance at Sec. 32 of the Income Tax Law of 1894 (See 157 U. S., footnote p. 437), amply proves the correctness of Senator Root's assertion that the new Corporation Income Tax is similar to the old general income tax which provides

Income Tax of 1894.	Corporation Income Tax of 1909.
That there shall be assessed, levied and collected, etc., a tax of two *per centum annually, on the net profit or income, etc., of all Banks, etc., and all other corporations, companies or associations, doing business for profit in the United States,* no matter how created or organized but not including partnerships.	That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, * * * *shall be subject to pay annually* a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company, * * * *equivalent* to *one per centum* upon the *entire net* income * * *.

The addition of the words "in respect to the doing or carrying on of business" could hardly have changed the nature of that tax, making constitutional what without this mystical formula was unconstitutional. Modern law no longer recognizes the sacrosanctity of stereotyped legal phrases. Such an idea lies buried in the domain of primitive law.

The law of 1894 just quoted was held unconstitutional as applicable to companies deriving revenue from real estate or personal property.

The present corporation tax, then, being similar to the tax on corporations under the Act of 1894, is in its nature an income tax rather than an excise on doing business. Treating the tax as a whole, however, it must fall either within the category of a franchise tax, or an income tax. It is not logically possible to escape the dilemma. There is no third class in which it may be placed. This Court has aptly characterised such a tax as "a tax upon its franchise based upon its income."

> Mercantile Bank *v.* New York, 121 U. S., 138, 160.

Whichever it may be held to be, it is void as regards the two corporations here whose sole income is derived from rents.

The nature of a franchise tax has been analyzed and the tax classified by the Court in numerous cases. Suffice it to refer to Home Ins. Co. *v.* New York, 134 U. S., p. 594. A tax by the State of New York, upon the "corporate franchise or business of the Company" was held not to be a tax upon United States bonds, owned by the Company, *but upon the right to be a corporation.*

> "The right or privilege to be a corporation, or to do business as such body is one generally deemed to be of great value to the corporations, or it would not be sought in such numbers as at present * * *. The granting of such right or privilege rests entirely in the discretion of the State, etc."

The same doctrine is found as settled law in the following cases, Society for Savings *v.* Coite, 6 Wall., 594; Provident Institution *v.* Mass., *Ibid,* 611.

The reason the tax is so classified, as so lucidly explained by Mr. Justice Field, is because the legal incidence of the tax is upon corporations as such and consequently upon corporate franchises. This conclusion seems inevitable. The object of the present law was not a specific business or even any general category of business enterprises, but admittedly corporations generally.

The circumstances of its genesis, the wishes of the administration that framed it, the outspoken declaration of its chief legislative advocates, the analogy of the clauses of the old income tax law bearing on corporations, and the repeated decisions of this Court concur in ineffaceably stamping this tax as belonging to the well recognized class denominated corporation or franchise taxes, To attempt to evade the consequences by assimilating it to another and inherently different kind of tax cannot be done without ignoring its plain language, the nature of the tax and the decisions of the Court.

II.

This tax upon the franchise of corporations created by the State is unconstitutional because it is a tax upon a power belonging exclusively to the States.

We have no wish to iterate and re-iterate the fundaments of our Constitutional Law. Foundation stones in our Constitutional edifice such as McCulloch *v.* Maryland, it would be a work of supererogation at this bar to do more than mention.

The following cases settle the principle that where the Federal Government has an exclusive right of control or regulation, that right cannot be taxed by a State. And the argument is based upon the nature of our dual government which protects the integrity of both central

and local government, one against the other. An unavoidable parity of reasoning makes the cases upholding the proposition that the State Government cannot tax any power or function reserved by the Constitution to the Federal Government equally applicable to the action of the latter in taxing any power constitutionally belonging to the former.

That the principle is reciprocal cannot be disputed.

The first class of cases referred to includes:

McCulloch *v.* Maryland, 4 Wheat., 315, 435.
Weston *v.* Charleston, 2 Peters, 449.
Osborn *v.* The Bank of the United States, 9 Wheat., 738.
Bank of Commerce *v.* New York, 2 Black, 620.
Banks *v.* The Mayor, 7 Wall., 16.
Moran *v.* New Orleans, 112 U. S., 69.
Harman *v.* Chicago, 147 U. S., 396.
California *v.* Central Pacific R. R., 127 U. S., 1.
Dobbins *v.* Erie County, 16 Pet., 434.

The exemption of patents from State taxation is held in

People *ex rel.* The Edison Electric Light Co. *v.* Campbell, 138 N. Y., 543.
Commonwealth *v.* Westinghouse, 151 Pa. St., 265.

The cases in which this Court has applied the same principle to the protection of the State Governments against the Federal Government are:

The Collector *v.* Day, 11 Wall., 113.
United States *v.* R. R. Co., 17 Wall., 322.
Mercantile Bank *v.* New York, 121 U. S., 138, 162.
Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429.
Ambrosini *v.* United States, 187 U. S., 1.

Approved unanimously in

South Carolina *v.* United States, 199 U. S., 437, 449, 468.

See also as to other inherent limitations upon federal legislation:

United States *v.* Dewitt, 9 Wall., 41.
Keller *v.* United States, 213 U. S., 138.

Assuming then that the principle of immunity is reciprocal, does this principle apply to the taxation at the will of one government of a corporate entity created by the other? Evidently the exact case has not heretofore arisen as to a corporation chartered by a State and taxed by the Federal Government, else this precise question would already have been adjudicated and this argument become superfluous. But if the precise case has not arisen, its exact converse has, and if it be admitted, as it always has been, and still must be, that this principle of immunity is reciprocal, then indeed it must be conceded that this Court has adjudicated the very question here involved. California *v.* The Pacific Railroad Co., 127 U. S., 1, seems to have settled the invalidity of this very tax.

There are only two ways of avoiding this result, (1) a refusal to follow that case, (2) a declaration that the principle does not work both ways and that the powers exclusively within State jurisdiction no longer enjoy the same immunity from Federal attack, and consequent potential destruction, as do the Federal powers from State interference. A decision to this effect would repudiate our Federal system and is of course unthinkable

If a tax upon a Federal franchise is a tax upon the Federal power under which it is granted, by what possible subtlety can the advocates of the tax claim that a tax on a State franchise is not one on the power under which such franchise is granted. The most scholastic of metaphysicians might well find the burden heavy.

In the year 1883 the State of California imposed an assessment upon the property of the Central Pacific Railroad. Said assessment was "not made separately upon the *franchise,* roadway, road-bed, rails and rolling stock, or any properties of said railroad, but all of said property was blended together in making said assessment."

Two questions only arose on the record;—(1) whether the tax was in accord with the State Constitution which divided the State powers of taxation between the local and general authorities; (2) whether the franchise emanating from the United States was taxable. That was the real question involved and considered. Mr. Justice Bradley delivered the unanimous opinion of the Court, saying, 127 U. S., 35, 38, 40, 41:

> "The first question then, is whether the defendant in these cases had any franchises granted to them by the Government of the United States. Of this there can hardly be a doubt. * * * Thus without referring to the other franchises and privileges conferred upon this Company, the fundamental franchise was given by the Acts of 1862 and subsequent acts to construct a railroad from the Pacific Ocean across the State of California, etc, * * * This important grant, though in part collateral, was *independent of that made to the Company by the State of California.* * * *
>
> Assuming then that the Central Pacific Railroad Company has received the important franchise referred to by grant from the United States, the question arises whether they are legitimate subjects of taxation by the States. They were granted to the Company for national purposes and to subserve national ends. It seems clear that the State of California can neither take them away nor destroy nor abridge them, nor cripple them by onerous burdens, can it tax them? It may undoubtedly tax outside visible property of the Company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States?

> In our judgment it cannot. * * * No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise.* * * * Recollecting the fundamental principle, that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of the power of the Government that confers it. *To tax it, is not only derogatory to the dignity, but subversive of the powers of the Government and repugnant to the paramount sovereignty.*"

This Court then found that the Railroad Company received from the United States Government "important franchises connected with its railroad," and that the State authorities included in the tax the value of such franchise, which the Board was prohibited by the Constitution of the State and of the United States from so including, and the tax was accordingly adjudged void.

There is thus no room for cavil as to what the Court there decided or on what proposition it based its decision. Transpose the words State and United States in that case and the Corporation Income Tax will be seen to be unconstitutional, assuming as we must that the Court will protect the integrity of the Constitution whether the menace be from Federal or State legislation. This Court has recently so declared in emphatic tone.

In Ambrosini *v.* U. S., 187 U. S., p. 1, where the sole question involved was the taxability of the bonds required to be given by liquor dealers under the Illinois law in order to obtain their license to sell, the Court speaking through the Honorable Chief Justice said:

> "The general principle is that as the means and instrumentalities employed by the general Government to carry into operation the powers granted to it are exempt from taxation by the State,

so are those of the States exempt from taxation by the general Government. It rests on the law of self-preservation, for any Government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct Government, exists only at the will of the latter."

In 1905 this Court again said:

"The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency."

South Carolina *v.* U. S., 199 U. S., 437, 456.

The power to grant charters is one of the oldest State powers. It antedates the Revolution. Taxation with its logically concomitant potential destruction of this power by the general Government would thus be an attack upon, and possible annihilation of, one of the greatest and oldest of State functions.

The tender solicitude with which this Court has cherished this inherent and unavoidable postulate of our public law is well shown in Moran *v.* New Orleans, 112 U. S., 69, where a state license tax upon a tow-boat running to Mexico imposed under a general State law taxing such vessels was held unconstitutional as interfering with the power over Interstate Commerce residing in the Federal Government.

EXAMINATION OF CASES CLAIMED TO LIMIT THE RECIPROCAL IMMUNITY PRINCIPLE IN ITS APPLICATION TO STATE POWERS.

The learned Counsel for the Government can sustain the validity of the tax on one ground only; that it is a tax on the business of the corporation and hence valid under the doctrine of Soule *v.* Pacific Insurance Co., 7 Wall., p. 433, reaffirmed in the Srpeckels case, which though made much of by the authors of this law

neither did nor purported to do more than reiterate an old and settled rule of federal taxation. That this is a corporation tax, not a business excise, has been shown.

The contention that such a tax is not contrary to the reciprocal immunity principle will probably be predicated upon two recent and important pronouncements of this Court. They are Knowlton *v.* Moore, 178 U. S., p. 41 ,and South Carolina *v.* United States, 199 U. S., 437. Neither of these case seems to us to modify the principle of reciprocal immunity. If they do so the Court must have acted unconsciously in upsetting the Constitution since in both cases the principle is restated and an intention to disregard, modify or limit it expressly disclaimed.

The Knowlton case is too recent and well known to require long discussion. The War Revenue law of 1898 taxing successions was attacked as unconstitutional on the ground (as stated by Hon. John G. Carlisle), that

> "the tax in question is an attempt under the guise of taxation to regulate and control a subject over which Congress has no power but which is within the exclusive jurisdiction of the States." (Appellant's Brief, p. 3.)

This Court, after showing that such form of federal taxation was an old one, almost contemporaneous with the Constitution, answered the contention that the tax was upon a State power as follows:

> "The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several States, therefore, Congress is without authority to tax the transmission or receipt of property by death. This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the national Government or the instrumentality employed to carry such powers into execu-

tion, *and conversely that the same limitation rests upon the National Government in relation to the powers of the several States.*

But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of the property upon death. *The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt and not the right existing to regulate."*

The incidence of the tax was on the act of transmission or receipt of the property. Economically speaking, the tax was upon the property forming the *corpus* of the succession, but if it had been held that the tax was upon the property then the doctrine of the income tax cases would have invalidated it as a non-apportioned direct tax. Having been treated from the beginning as a particular kind of tax, the Court evidently viewed the incidence not as upon the property but as upon the act of transmission or receipt. But in the case at bar any logical analysis makes inevitable the conclusion that the incidence of the present tax can only be one of two things, (1) the franchise or (2) the income; but this Court has held the tax on a federal franchise to be a tax on the *power to regulate Interstate Commerce*, so the distinction between the Knowlton case and this one is made manifest. If a State tax upon a Federal franchise be a tax upon a Federal power then by inevitable parity of reasoning a Federal tax upon a State franchise is a tax upon a State power, since, as this Court has repeatedly held, the granting, of a corporate franchise is completely within the power of the State. (Horn Silver Mining Co. *v.* New York, 143 U. S., p. 305.)

The Knowlton case sustains our major proposition, merely holding it inapplicable to a kind of tax, which was traditionally an excise, on the receipt of an inheritance.

The South Carolina case stands upon the proposition that when a State embarks upon a private business venture, it is subject to those portions of the Federal Internal Revenue tax applicable to such business. An excise tax on the liquor business, being constitutional while the business is carried on by an individual, remains constitutional after the State has taken over such business. The principle of reciprocal immunity is expressly admitted in the opinion of the Court. The dissenting opinion written by the Justice who wrote the opinion of the Court in the Knowlton case proceeds upon the theory that the tax is in fact obnoxious to the governmental immunity rule because the business is carried on as one of the incidents of the State's admitted power to regulate the liquor business.

Thus the difference in the Court turned upon the question whether the State was performing what was essentially a public function in monopolizing the liquor business or merely running a private venture. The difference was not one of principle, but of classification between private and public business.

We confidently submit that no lawyer can ever claim that the State in granting corporate franchises is engaging in a private business.

Summing up on this head, we say that the tax being upon the corporate franchise or right to be a Corporation is invalid.

III.

The tax in so far as it is falls upon income derived from real or personal property is a direct tax and hence invalid at least as to all income so derived.

The records in these two cases show all of the income of these corporations to have been derived either from the rent of real estate or of personal property As this Court has decided in the Income Tax Cases that a tax on income so derived was a tax on the realty or personalty itself, it necessarily follows that if the tax

have income as its incidence, it is at least as to the class of corporations to which these appellants belong unconstitutional. The tax must, as shown, fall either on the franchise or the income. If upon the former, the income being a mere measure of the value of the franchise, then the whole tax law must be invalid as a tax on a power belonging to exclusive State domain, but if the tax is on the income, the ruling in the Pollock case automatically invalidates it as to companies deriving their income as these companies do.

Whether if the tax is invalid because direct in its application to income from particular sources, the invalidity affects the whole law may be doubtful. If the invalid and valid provisions of the law be so inextricably woven together as to form one whole scheme of taxation the whole law must fall. If, on the other hand, the Court deems that these corporations deriving income from realty and personalty may be exempted from the operation of the law without materially affecting the whole scheme, it might hold it good as to other corporations. This question is unnecessary to discuss here as in either event the tax would be void as to the appellant corporations; the larger question as to the effect of such a ruling on the whole law will doubtless be fully dicussed by others in these cases.

In the Pollock case the tax on corporations which was held void as to income from realty and personalty was admittedly an income tax. Can the nature of a tax on corporations be changed by repealing the tax as to individuals? If the clause of the old income tax law (§32) relating to the income of corporations had been enacted alone, would its nature have been other than or different from the tax actually assessed against the Farmers' Loan & Trust Company? The non-inclusion of individual incomes could scarcely have changed the incidence of the tax or indicated any other intention than to tax all corporations by striking their incomes. If it be argued that such a law is indicative that the object sought to be taxed is not incomes, but corporations, then the tax may be considered as a franchise tax; but one or the other

it must be; there can be no middle ground. The only difference between this tax and the old one lies in the fact that (1) the name is different and (2) the tax is solely applicable to corporations. The label is not in any way determinative of the tax and its restriction to one kind of persons is conclusive that the tax cannot be an excise on business since it would then be applicable regardless of the persons by whom the business was carried on. Its restriction to a class of persons indicates that the tax was on that class; as such it could be construed to fall either upon the right to belong to such a class (to be a corporation) or to be a tax upon the income generally from all sources, in which case it must be as to corporations a general income tax. In either event the result is the same as to these two corporations. The tax is unconstitutional, either because (1) it is on the franchise to be a corporation or (2) being an income tax on corporations it is invalid as being an unapportioned direct tax.

Even as a tax on franchises it is a tax on property, and hence direct. It is the settled law of this Court that a corporate franchise is personal property,

See

Gulf & Ship Island R. R. Co. *v.* Hewes, 183 U. S., p. 66.
Postal Tel. Co. *v.* Adams, 155 U. S., 696.
Atlantic & Pacific Tel. Co. *v.* Philadelphia, 190 U. S., at p. 160.

The distinguished feature of excise taxation is that it is primarily imposed upon voluntary acts and may be avoided by abstaining from such acts. But here the corporations upon which the tax is imposed are already in existence and are receiving income, and no abstention from activity on their part will avoid the tax. They can escape only by dissolution or corporate suicide. It is true that the inheritance tax was sustained as an excise, but this classification, as already shown, was based principally upon historical grounds. Moreover the inheritance tax was upon an event to take place in the future and not upon an already existing status.

IV.

The tax is violative of the fourth and fifth amendments in that it involves unreasonable searches and lacks in due process of law.

These phases will doubtless be fully argued in some of the other cases. Suffice it to call the attention of the Court to those clauses of the law requiring the filing of returns by corporations, which make evident the real intention of Congress to supervise matters within the exclusive cognizance of the State.

These clauses, in connection with the history of the act, indicate beyond peradventure the purpose of the law to be an encroachment upon the local governments by the central government, as a result of the clamor against corporations. Not revenue nor a general tax upon a special business, but an instrument with which to regulate from Washington the corporations formed under State law is the objective. To curb, regulate or emasculate corporate wealth may be wise or desirable. To do so at the expense of crippling the federal principle seems neither wise, desirable nor necessary. It is the first step that counts. (*C'est le premier pas qui coûte.*)

A corporation tax law supplemented by a federal incorporation law will be amply calculated to deprive the States of one of their great powers and to substitute for Marshall's and Webster's indestructible duality one centralized Government. It will not be a long step to reducing the real self-governing American Commonwealths to the condition of mere administrative divisions, such as a French "Department" or German "Circle." Will the Court care to sanction the initial step?

All of which is respectfully submitted this fourteenth day of March, 1910.

FREDERIC R. COUDERT,
Counsel for Appellants,
2 Rector St., N. Y.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 209

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF KATY BLAKE, DECEASED, APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

(22,022)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GEORGE BATY BLAKE, DECEASED, APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1910.

1 *Bill of Complaint.*

In the Circuit Court of the United States, Southern District of New York.

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

v.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

To the Judges of the Circuit Court of the United States for the Southern District of New York, Sitting in Equity:

Arthur Lyman and Arthur T. Lyman, citizens of the Commonwealth of Massachusetts and residents of the City of Waltham, in said Commonwealth, alleging that they are the trustees under the Last Will and Testament of George Baty Blake, late of Boston, Massachusetts, deceased, and as such trustees are the owners of one hundred and fifty shares of the capital stock of the Interborough Rapid Transit Company, bring this their bill of complaint, in behalf of themselves and all other stockholders who are similarly situated, and who shall be entitled to avail themselves of the benefit of this suit against Interborough Rapid Transit Company, a corporation created and existing under and by virtue of the laws of the State of New York, located and having its principal office for the transaction of business in the City of New York, in the Southern District of New York, Edward J. Berwind, Andrew Freedman, John Pierce, Theodore P. Shonts, Francis de C. Sullivan, Alfred Skitt, Cornelius Vanderbilt, Gerald L. Hoyt and William A. Read, all citizens of the State of New York and residents of the Southern District of said State, and August Belmont, Edwin Hawley and James Jourdan, citizens of the State of New York and residents of the Eastern District of said State, Horace M. Fisher and George W. Young, citizens of the State of New Jersey and residents of the District of New Jersey, and Gardiner M. Lane, a citizen of the Commonwealth of Massachusetts and a resident of the District of Massachusetts; and thereupon your orators complain and say as follows:

2

First. Your orators show that defendant Interborough Rapid Transit Company is a corporation duly organized and existing under and by virtue of the provisions of a certain act of the Legislature of the State of New York, entitled "An Act to amend Chapter Four

of the Laws of Eighteen Hundred and Ninety-one, entitled 'An Act to provide for rapid transit railways in cities of over one million inhabitants," being Chapter 544 of the Laws of 1902.

Your orators further show that in and by said Act specific
3 provision was made for the incorporation of companies to take over and exercise the rights and privileges connected with the leasing, operation and maintenance of any rapid transit railroad which might be constructed by a municipality under the provisions of said act, and that said defendant Interborough Rapid Transit Company was so incorporated for the express purpose of so leasing, operating and maintaining the rapid transit railroad in the City of New York, which is a municipal enterprise of the City of New York, and an instrumentality of government of the State of New York. Reference is prayed to said Act and to the Railroad Law of the State of New York, for the powers and duties of said defendant Interborough Rapid Transit Company and of its directors. The capital stock of said corporation now consists, and since the 26th day of August, 1902, has consisted of the sum of Thirty-five Million (35,000,000) Dollars, divided into three hundred and fifty thousand (350,000) shares of the par value of One Hundred Dollars each.

Second. Your orators further show that the said defendant Interborough Rapid Transit Company was duly incorporated May 6, 1902, for the purpose, among others, of equipping, operating and maintaining the rapid transit railroad in the City of New York then in process of construction under a contract made pursuant to the provisions of "An Act to provide for rapid transit railways in cities of over one million inhabitants," above referred to, and dated February 21, 1900, between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners), and John B.
4 McDonald, which contract is known as Rapid Transit Contract No. 1. That by written assignment, dated July 10, 1902, the said McDonald, with the consent of the City of New York, duly assigned to Interborough Rapid Transit Company the leasing and operating provisions of said contract, and that by the terms of such assignment and the contract Interborough Rapid Transit Company became obligated to furnish the necessary equipment and to operate and maintain the railroad constructed thereunder. Your orators show upon information and belief that the defendant Interborough Rapid Transit Company commenced the operation of the railroad constructed under said Principal Contract No. 1 on or about the 21st day of October, 1904, and has continuously operated it since that date.

Your orators further show that the defendant Interborough Rapid Transit Company also operates the rapid transit railroad in the City of New York built as an extension of the railroad constructed under said Rapid Transit Contract No. 1, known as the "Brooklyn Extension." That such railroad was constructed under a contract made pursuant to the provisions of "An Act to provide for rapid transit railways in cities of over one million inhabitants," above referred to, and dated July 21, 1902, between the City of New York (acting by

its Board of Rapid Transit Railroad Commissioners) and Rapid Transit Subway Construction Company, a corporation of the State of New York, known as Rapid Transit Contract No. 2. That by written assignment dated August 10, 1905, said Rapid Transit Subway Construction Company, with the consent of the City of New York, duly assigned to Interborough Rapid Transit Company the leasing and operating provisions of said contract; and that by the terms of such assignment and contract, Interborough
5 Rapid Transit Company became obligated to furnish the necessary equipment, and to operate and maintain the railroad constructed thereunder. Your orators show upon information and belief that the defendant Interborough Rapid Transit Company commenced the operation of the railroad constructed under said Principal Contract No. 2 on or about the 16th day of January, 1905, and has continuously operated it since that date.

Your orators further show that the rapid transit railroad or "subway" in the City of New York constructed under the two contracts above mentioned and now operated by the Interborough Rapid Transit Company constitute one complete system extending from the intersection of Atlantic and Flatbush Avenues in the Borough of Brooklyn, through and under certain streets in said borough, and under the East River to the southerly end of Manhattan Island, and thence through and under various streets in the Borough of Manhattan in a northerly direction to terminii at 242nd Street and Broadway in the Borough of The Bronx, and 180th Street and Boston Road in the Borough of The Bronx.

Your orators further show that said defendant Interborough Rapid Transit Company operates the system of elevated railways of the Manhattan Railway Company in the Boroughs of Manhattan and The Bronx, in accordance with the terms of a lease from the Manhattan Railway Company to the Interborough Rapid Transit Company, dated January 1, 1903. Said defendant has continuously operated said system of elevated railways since April 1, 1903. That the system so operated extends in a northerly direction from South Ferry along Second, Third, Sixth and Ninth Avenues in the Borough of Manhattan to terminii at 155th Street and Eighth Avenue, Borough of Manhattan, and at 198th Street and
6 Webster Avenue in the Borough of The Bronx.

Your orators show, upon information and belief, that the said defendant Interborough Rapid Transit Company is the owner of a majority of the capital stock of the New York & Queens County Railway Company, a street surface railroad corporation operating lines of surface railroads entirely within the Borough of Queens, in the City of New York, and that it is also the owner of a majority of the capital stock of the New York City Interborough Railway Company, a street surface railroad corporation operating lines of surface railroads in the Boroughs of Manhattan and The Bronx, City of New York.

Your orators show that the business conducted by the defendant Interborough Rapid Transit Company is solely and exclusively that of transporting passengers for hire in the City of New York, and that it is not engaged in the transaction of any business between the

State of New York and any foreign country, or between the State of New York and any other of the United States.

Third. Your orators show that the rapid transit railroads in the City of New York constructed under the said Rapid Transit Contracts Nos. 1 and 2 and operated by the defendant Interborough Rapid Transit Company are owned by the City of New York, which is a municipal corporation of the State of New York, and that the only interest of said defendant Interborough Rapid Transit Company therein is as lessee for a term of years. Under the terms of the lease of said rapid transit railroads the defendant is
7 required to pay as rental annually the interest accruing upon the bonds of the City of New York, the proceeds of which were used for the construction of such railroads, and also an annual payment or percentage as a sinking fund which will be used to redeem those bonds prior to the termination of the original term of the lease of said rapid transit railroads in 1954.

Your orators further show that Section 35 of the "Act to provide rapid transit railways in cities of over one million inhabitants", as it existed at the time of entering into each of the two contracts above referred to, provided as follows:

"SEC. 35. The equipment to be supplied by the person, firm or corporation operating any such road shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used in the generation or transmission of motive power, and including all power houses and all apparatus and all devices for signalling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract, and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road."

That each of the two rapid transit contracts which were assigned to the defendant Interborough Rapid Transit Company contained provisions exempting the person, firm or corporation operating the railroads constructed under said contracts from all taxation on their interest therein, by language which is practically identical with said Section 35. That by Chapter 597 of the Laws of 1905, Section 35 of the "Act to provide rapid transit railways in cities of over
8 one million inhabitants" was amended by omitting the exemption provision, but by Section 3 of the said amending act any rights which might have accrued under the acts amended as to railroads already constructed, constructing or contracted for, were preserved and continued in full force and effect. Your orators therefore aver that in and by the provisions of said Section 35 and the two Rapid Transit Contracts, there exists a valid agreement between the State of New York, the City of New York, and the defendant Interborough Rapid Transit Company, exempting said company from any and all taxation in respect to its interest in the rapid transit railroads in the City of New York. This exemption from taxation has recently been upheld by the Court of Appeals of the

State of New York in the proceeding instituted by the defendant company to review a special franchise tax assessed against it by reason of its interest in the said rapid transit railroad.

Fourth. Your orators further show that in and by the acts of the legislature of the State of New York above referred to, and in accordance with which the defendant company was incorporated, and in accordance with the duly adopted by-laws of the said company, it is, among other things, provided that the stock, property, affairs and concerns of said defendant company should be managed and wholly conducted by fifteen directors. That such directors should hold office until others were chosen in their stead, and that such directors should be stockholders in the company in their own right and likewise citizens of the United States. As your orators
9 are informed and verily believe, the defendants above named, Edward J. Berwind, Andrew Freedman, John Pierce, Theodore P. Shonts, Francis de C. Sullivan, Alfred Skitt, Cornelius Vanderbilt, Gerald L. Hoyt and William A. Read, all citizens of the State of New York and residents of the Southern District of said State, and August Belmont, Edwin Hawley and James Jourdan, citizens of the State of New York and residents of the Eastern District of said State. Horace M. Fisher and George W. Young, citizens of the State of New Jersey and residents of the District of New Jersey, and Gardiner M. Lane is a citizen of the Commonwealth of Massachusetts and a resident and inhabitant of the District of Massachusetts, and that said defendants are the directors of the said defendant Interborough Rapid Transit Company, duly elected as such and are now acting in that capacity and are managing and conducting all and singular the affairs, stock, property and concerns of the said defendant Interborough Rapid Transit Company.

Fifth. Your orators further show, as has been alleged above, that the capital stock of the defendant Interborough Rapid Transit Company consists of Thirty-five Million (35,000,000) Dollars, and that its average indebtedness during the year ending December 31, 1909, was $36,677,667, which consisted of $23,771,833 of 6% notes due March, 1911, and $6,633,637 of 5% notes due September, 1909, and $6,239,167 of 5% forty-five year gold bonds secured by mortgage upon all the real estate and personal property owned by said defendant and also upon its interest in the lease of said rapid transit railroads and in the lease from the Manhattan Railway Com-
10 pany, and which total average indebtedness was in excess of the total amount of the paid-up capital stock of said defendant, to wit, $35,000,000. That the interest upon said bonds and notes for the year ending December 31, 1909, will exceed the sum of $2,075,000. That in addition to the said interest upon its own bonded indebtedness, the interest which the defendant pays upon the City bonds issued for the construction of the rapid transit railroads which it operates will exceed for the year ending December 31, 1909, the sum of $1,393,700. That the net earnings of the corporation for the year ending December 31, 1909, exclusive of said payments of interest upon its own bonds, and upon those of the City of New York, and of rental paid to Manhattan Railway Company, will be about $15,732,666.

Sixth. Your orators further show that they are citizens of the Commonwealth of Massachusetts and residents of the City of Waltham in said Commonwealth, and that they are the trustees under the last will and testament of George Baty Blake, late of Boston in the Commonwealth of Massachusetts, deceased, and that as such trustees they became the owners and registered holders of one hundred and fifty shares of the capital stock of said defendant Interborough Rapid Transit Company, during December, 1905, and that since that time your orators have been and still are stockholders in said company, owning and holding as such trustees said one hundred and fifty shares of the capital stock of said defendant, the value of which exceeds the sum of $25,000. The capital stock of said company is divided among a large number of different persons, who as such stockholders constitute a large body, and this suit is
11 for an object common to them all. Your orators therefore bring this suit in their own name and in their own behalf as stockholders in said company, and also as representatives and on behalf of such of the other stockholders similarly situated and interested, if they may choose to intervene and become parties thereto.

Seventh. Your orators further show that, as they are informed and verily believe, defendant Interborough Rapid Transit Company and a majority of its directors who are managing and conducting its business, have announced that, under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, they intend to voluntarily make and file with the Collector of Internal Revenue, prior to the 1st day of March, 1910, a return or statement showing in detail the amount of the net earnings or profits of Interborough Rapid Transit Company for the year ending December 31, 1909, and to voluntarily pay to the said Collector of Internal Revenue, before the first day of July, 1910, a tax of one per cent on the net earnings or income of the said defendant, for the calendar year ending December 31, 1909. That in and by said act, every corporation now or hereafter
12 organized under the laws of the United States or of any State or territory of the United States, or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country, and engaged in business in any State or territory of the United States, or in Alaska or in the District of Columbia, is made subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation equivalent to 1% upon the entire net income over and above Five Thousand (5,000) Dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon the stock of other corporations, subject to tax imposed by that act. That the net income upon which the tax is to be measured is to be ascertained by deducting from the gross amount of such corporation received by it within the year from all sources, (1) all operating expenses, including rentals or franchise payments; (2) all losses not compensated by insurance, including depreciation allowance; (3) interest actually paid within the year

on its bonded or other indebtedness to an amount not exceeding the paid-up capital stock of such corporation; (4) all sums paid by it within the year for taxes imposed under the authority of the United States or any State; (5) all amounts received by it as dividends upon the stock of other corporations, subject to the tax imposed by the act.

Your orators further show that for the year ending De-
13 cember 31, 1909, the tax which the defendant Interborough Rapid Transit Company would have to pay upon its net income, arrived at as ascertained under the provisions of said Act, would, as your orators are informed and verily believe, exceed the sum of $50,000. That in determining said net income, and by reason of the fact that the average debt of said defendant exceeds its capital stock to the amount of $1,677,667, said Interborough Rapid Transit Company, to the extent of $83,883, will be deprived of the benefit of deducting from its gross earnings the interest payable upon its bonds and notes in excess of the amount of its capital stock.

Eighth. Your orators aver that the provisions of said Act purporting to levy a special excise tax upon all corporations with respect to the carrying on or doing business by such corporations, and measured by a percentage upon their net income, determined as aforesaid, are unconstitutional, null and void, in that the said tax is in effect a tax upon the corporate existence of the defendant Interborough Rapid Transit Company, and is therefore a tax upon the exercise by the State of New York of sovereign powers, not surrendered to the United States, and clearly reserved to the State of New York under the Tenth Amendment to the Constitution of the United States.

Ninth. Your orators further aver that the said tax imposed upon the defendant Interborough Rapid Transit Company by the provisions of said Act of Congress, to the extent that it is measured by the income derived from the operation by the said company of the Rapid Transit railroad in the City of New York, as aforesaid, is a tax imposed upon the franchise of the said company to hold and
14 operate a municipal property, created and existing for the purpose of carrying on a municipal enterprise; that it is a tax upon the income derived by the said Interborough Rapid Transit Company from said property; that as such it is a tax upon an incident to said property and is a tax upon municipal property, and is therefore not a tax that can be lawfully imposed by the Congress of the United States under the Constitution of the United States.

Tenth. Your orators further aver that the provisions of the aforesaid Act of Congress imposing the said tax are unconstitutional, null and void, in that they are not uniform throughout the United States, as required in and by Section 8 of Article 1 of the Constitution of the United States, in that no power is conferred upon the Congress of the United States under any provision of the Constitution to impose a tax that is unequal and not uniform with respect to all classes of citizens and persons, whether natural or incorporate, engaged in the same general character of business or occupation; and in that the only power conferred upon the Congress to impose a tax is to

impose a tax levied upon the principle of equality and uniform apportionment among the persons taxed; and your orators aver that the said tax is not uniform, and is unequal, in the following respects:

(*a*) Because said tax is imposed upon corporations measured by a percentage upon the net earnings of said corporations, whereas no similar tax is imposed upon the income of either individuals or partnerships, although they may be engaged in the same general business.

(*b*) Because by said law a larger tax is imposed upon the
15 defendant Interborough Rapid Transit Company, by reason of the fact that its indebtedness exceeds the amount of its paid-up capital stock than upon other corporations engaged in the same general business whose capital stock exceeds their funded debt.

(*c*) Because labor, agricultural organizations, horticultural organizations, fraternal beneficiary associations, orders or associations operating under the lodge system, domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, all of which are corporations, are specifically exempted in and by said act from all liability for the tax imposed thereby.

(*d*) Because all corporations whose net income for any one calendar year is less than or does not exceed Five Thousand (5,000) Dollars, are specifically exempted in and by said act from the imposition of the tax levied thereby.

Eleventh. Your orators further aver that the provisions of the aforesaid Act of Congress imposing said tax are unconstitutional, null and void in so far as the tax is imposed upon the defendant Interborough Rapid Transit Company, in that it impairs the obligation of the contracts between the defendant company, the City of New York and the State of New York, exempting the said company from all taxation by reason of its interest in the rapid transit railroad in the City of New York and by reason of its ownership of the equipment for said rapid transit railroad.

16 Twelfth. Your orators further aver that the franchise to operate the said rapid transit railroad and the franchise to operate the said elevated railway and structures, are, by the laws of the State of New York, defined to be real estate, and that substantially the entire income of the said company is derived from the said real estate and from other real estate owned in fee, and from cars, equipment, and other personal property; and that if said tax under the aforesaid law be construed as a tax upon income, the provisions of the act imposing said tax are unconstitutional, null and void, because it is a direct tax upon the income from real estate and personal property, and in effect upon the real estate and personal property itself, and is not apportioned among the several States according to population, as required by Sections 2 and 8 of Article 1 of the Constitution of the United States.

Thirteenth. Your orators further aver that the provisions of said act imposing the said tax are unconstitutional, null and void, in that they impose a tax of one per cent upon the income of said Inter-

borough Rapid Transit Company which accrued prior to August 9, 1909, the date upon which said act became a law, in contravention of the provisions of the Constitution of the United States, Section 8, Article 1, providing that Congress should pass no ex post facto law.

Fourteenth. Your orators further aver that the said provisions of said act imposing said tax are unconstitutional, null and void,
17 in that all corporations thereby taxed may be compelled to produce and disclose their private books and papers in order to make them liable to a penalty or to forfeit their property in violation of Articles 4 and 5 of the Constitution of the United States.

Fifteenth. Your orators further show that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance; that they have duly requested the defendant company and its directors in writing to omit and refuse to pay and to refrain from paying said tax and to contest the constitutionality of said act and to refrain from voluntarily making returns and statements required by the provisions of said act and to apply to a court of competent jurisdiction to determine this company's liability under said act; and that a copy of said request is hereto annexed, marked Exhibit "A," and made a part of this bill of complaint; and that the said defendant company and a majority of its directors, after a meeting of the directors at which the matter and said request were formally read before them for action, have, as your orators are informed and verily believe, refused and still refuse, and do not intend to comply with your orators' request, and have resolved and intend to comply with all and singular the provisions of said Act of Congress and make and file returns and statements required thereby and pay said tax, without protest, upon all its net earnings, including therein its rents from real estate. A copy of the refusal of said company is hereto annexed as Exhibit "B" to this bill.

18 Sixteenth. Your orators further show that if the defendant company and its directors, as they propose and have declared their intention so to do, pay said tax out of the income and profits of the defendant company, they will thereby diminish the assets of said company and lessen the dividends thereon and the value of its shares.

Seventeenth. Your orators further show that the voluntary compliance with the provisions of said Act of Congress in so far as it imposes a tax upon the defendant, will expose the defendant company to a multiplicity of suits by and on behalf of its numerous shareholders, and that numerous suits will work irreparable injury to the business of the company and involve it in great and irreparable damage.

Eighteenth. Your orators further show that this is a suit of a civil nature in equity. That the matter in dispute exceeds, exclusive of interest and costs, the sum and value of Five Thousand (5,000) Dollars, and arises under the Constitution and laws of the United States; that this is furthermore a controversy between citizens of different States, and that your orators and other stockholders of said defendant company have no adequate remedy at law in the premises.

That the contemplated action by the defendant company and its directors, the individual defendants, is contrary to equity, and good conscience, and tends to the manifest wrong, injury and oppression of your orators in the premises.

Wherefore and in consideration whereof, and inasmuch as
19 by the strict rules of the common law, your orators are relievable only in a court of equity where matters of this nature are properly cognizable and relievable, your orators pray:

1. That it may be adjudged and decreed that the provisions of said Act of Congress, approved August 9, 1909, purporting to authorize a special excise tax upon the defendant Interborough Rapid Transit Company, with respect to the carrying on or doing business by such corporation, measured by a percentage upon its net income, are unconstitutional, null and void.

2. That the defendants, said Interborough Rapid Transit Company, its directors, officers and employés, be restrained from voluntarily complying with the provisions of said act and making the return or statement above referred to, or paying the tax aforesaid.

3. That your orators may have such other and further or different relief in the premises as to this court of equity may seem just and proper.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief herein and hereby prayed for, and may full, true, direct and perfect answer make to the best and utmost of their knowledge and belief, and that said Interborough Rapid Transit Company under its corporate seal, and said individual defendants to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were especially interrogated thereunto:

20 may it please your Honors to grant unto your orators *a subpœna ad respondendum* issuing out of and under the seal of this Honorable Court, directed to the said defendants, Interborough Rapid Transit Company, August Belmont, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt and George W. Young, commanding them and each of them on a certain day and under a certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court, and then and there, full and true, direct and perfect answer make to all and singular the premises, further to perform and abide by such further order and decree as to your Honors shall seem meet and proper, and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orators, as in duty bound, will ever pray, etc.

ARTHUR LYMAN,
ARTHUR T. LYMAN,
As Trustees under the Will of George Baty Blake, Late of Boston, Complainants.

EVAN SHELBY,
Solicitor for Complainants.

21 COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Arthur Lyman and Arthur T. Lyman, being severally duly sworn, depose and say: That they are the trustees under the last will and testament of George Baty Blake, deceased, and are the complainants above named; that they have read the foregoing bill of complaint and know the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters they believe it to be true.

ARTHUR LYMAN.
ARTHUR T. LYMAN.

Subscribed and sworn to before me this 31 day of December, 1909.

[SEAL.] WM. J. E. SANDER,
Notary Public.

22 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Francis A. Campbell, of Boston, in said County, duly elected, qualified and sworn as Clerk of the Superior Court, for and within said County and Commonwealth, dwelling in Boston in said County, said Court being a Court of record with a seal which is hereto affixed, the records and seal of which Court I have the custody, do herein and hereby in the performance of my duty as said Clerk, certify and attest that Wm. J. E. Sander, before whom the annexed affidavit, proof or acknowledgement was taken and subscribed, is a Notary Public for, within, and including the whole of said Commonwealth, doing business in said County, duly appointed, commissioned, qualified, sworn and authorized by the laws of said Commonwealth to act as such; and also duly authorized by the laws of said Commonwealth to take affidavits and take and certify proofs of acknowledgement of deeds of conveyances for lands, tenements, hereditaments, lying and being in said Commonwealth; in any part thereof and to be recorded therein, wherever situated and however bounded; that he was at the time of taking the affidavit, proof or acknowledgement, hereto annexed, such Notary Public; that due faith and credit are and ought to be given to his official acts; that I am well acquainted with his signature and handwriting, and I verily believe that the signature to the said affidavit, proof or acknowledgement is genuine, and, further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and the seal of said Court at Boston, in said County and Commonwealth, this 31st day of December, A. D. 1909.

[SEAL.] FRANCIS A. CAMPBELL, *Clerk.*

23 EXHIBIT "A."

Arthur Lyman, 60 State Street, Room 903.

BOSTON, *Dec.* 24, 1909.

DEAR SIRS: We understand that corporations will shortly be required to file reports with the Federal officials, under the recent Act of Congress which imposed a special excise tax upon the net earnings of corporations, and we understand it is the intention of the officers of the Interborough Rapid Transit Company to comply with the provisions of the said law.

In view of the doubtful constitutionality of the said law, we herewith request the officers and directors of this company to take such steps as will prevent the voluntary compliance by the company with the provisions of said law, to refrain from making the returns and paying the taxes provided for thereunder, and to take such further steps as will contest the constitutionality of said law and properly protect the rights of the stockholders of the said company.

Very truly yours,

(Sgd.) " ARTHUR T. LYMAN,
ARTHUR LYMAN,
Trustees under the Will of George Baty Blake, Late of Boston.

To the Board of Directors, Interborough Rapid Transit Co., 165 Broadway, New York.

24 EXHIBIT "B."

DECEMBER 29, 1909.

DEAR SIRS: Your letter of the 24th instant, addressed to the Board of Directors of the Interborough Rapid Transit Company, was read and duly considered by the Directors at a meeting held today, and a Resolution, a copy of which I enclose, was adopted.

I remain,

Yours very truly, T. P. SHONTS, *President.*

Messrs. Arthur Lyman and Arthur T. Lyman, Trustees, 60 State Street, Boston, Mass.

25 EXHIBIT "C."

The President laid before the company a request of Mr. Arthur Lyman, and Arthur T. Lyman, as Trustees, addressed to the Directors, under date of December 24, 1909, requesting the Directors of the Company to take steps to prevent the voluntary compliance by the Company with the provisions of the Act of Congress of August 5, 1909, imposing a special excise tax upon the net earnings of corporations, and to take such further steps as will test the constitutionality of said law and properly protect the rights of the stockholders of said company.

After consideration it was

Resolved: That it was inexpedient for the company, in the absence of a decision by the Supreme Court of the United States that the said law is unconstitutional, to subject the company to the penalties provided by the said law for non-conformity therewith; that the company will be unable to comply with the request of the Messrs. Lyman and that the President be directed to so notify them.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

26 *Demurrer.*

Circuit Court of the United States, Southern District of New York.

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

Demurrer of Interborough Rapid Transit Company and the Other Defendants Above Named to the Bill of Complaint of Arthur Lyman and Arthur T. Lyman, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, the Above-named Complainants.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true, in such manner and form as the same are therein set forth, and alleged, do demur to the said bill and for cause of demurrer show that it appears by the complainants' own showing in the said bill that they have not made or stated such a cause of action as does or ought to entitle them to any relief as is thereby sought or prayed for from or against the defendants or any of them, and that said bill does not contain any matter of equity wherein this Court can grant any decree or give the complainants any relief or assistance against these defendants or any of them.

27 Wherefore, and for divers other errors and imperfections in said bill, these defendants demur thereto and demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill of complaint

herein, or to any of the matters and things therein contained and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

JAMES L. QUACKENBUSH,
Solicitor for Defendants, 165 Broadway, Borough of Manhattan, New York City.

I hereby certify that, in my opinion, the foregoing demurrer is well-founded in point of law and proper to be filed in the above cause.

JAMES L. QUACKENBUSH,
Solicitor for Defendants.

UNITED STATES OF AMERICA,
State of New York,
City & County of New York, ss:

Horace M. Fisher makes solemn oath and says that he is Secretary of Interborough Rapid Transit Company, one of the defendants above named, and that the foregoing demurrer is not interposed for delay.

HORACE M. FISHER.

Sworn to before me this 11th day of February, 1910.

EMIL PENSEL,
Notary Public, New York County.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

28 *Notice of Hearing.*

Circuit Court of the United States, Southern District of New York

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt Francis De C. Sullivan, Cornelius Vanderbilt, and George W Young, Defendants.

SIR: You will please take notice that this cause will be brought to a hearing on the bill and demurrer filed therein before Honorable Alfred C. Coxe, Circuit Judge, on the 11th day of February 1910

at 2 o'clock in the afternoon, or as soon thereafter as counsel can be heard.

Dated, New York, February 11, 1910.

EVAN SHELBY,
Solicitor for Complainants, 46 Cedar Street, Borough of Manhattan, New York City.

To James L. Quackenbush, Esq., Solicitor for Defendants, 165 Broadway, Borough of Manhattan, New York City.

(Endorsed:) Due service of a copy of the within is hereby admitted this 11th day of February, 1910.—James L. Quackenbush, Solicitor for Defendants.—U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

29 *Final Decree.*

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, Held at the United States Post Office in the Court House Building in the Borough of Manhattan, City of New York, This 11th Day of February, 1910.

Present: Hon. Alfred A. Coxe, Circuit Judge.

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis De C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having been heard in support of said demurrer and in opposition thereto, it is by the Court now here,

Ordered and decreed that the said demurrer be sustained and that the bill of complaint of the complainants above named be and the same is hereby dismissed with costs.

ALFRED C. COXE,
Circuit Judge.

Thereupon the above named complainants, stating that in this case the constitutionality of a law of the United States is drawn in question and in open court prays an appeal from the said
30 final decree direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided, it is therefore further

Ordered that said appeal be and the same is hereby allowed as prayed for in open court.

Said defendants then admitted in open court due notice of the said appeal and duly waived service of any citation thereon.

ALFRED C. COXE,
Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

31 Circuit Court of the United States, Southern District of New York.

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

Now comes the complainants above named, by Evan Shelby, their solicitor, and in connection with the complainants' petition of appeal from the final decree made and entered herein on the 11th day of February, 1910, dismissing the complainants' bill of complaint, with costs, make and file the following assignment of errors in pursuance of the statute and rule in such case made and provided.

First. That the Court erred in not holding that so much of the Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes" approved August 5, 1909, as relates to the levy and collection of a tax upon all corporations with respect to the carrying on or doing business by such corporations, measured by a percentage upon the net income of such corporation, as specified in Section 38, was unconstitutional, null and void in that such section violates Sections 2 and 8 of Article 1, Articles 4 and 5, and the tenth amendment to the Constitution of the United States.

32 Second. That the Court erred in not granting to the complainants the relief prayed in and by their bill or any part thereof.

Third. That the Court erred in sustaining the demurrer to said bill.

Fourth. That the Court erred in dismissing the said bill with costs.

Dated New York, February 11, 1910.

EVAN SHELBY,
Solicitor for Complainants, 46 Cedar Street, Borough of Manhattan, New York City.

EVAN SHELBY,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

33 *Bond.*

Circuit Court of the United States, Southern District of New York.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

Know all men by these presents, that The United States Fidelity and Guaranty Company, is held and firmly bound unto the above-named defendants, in the sum of five hundred dollars ($500) to be paid to the said defendants; for the payment of which, well and truly to be made, it binds itself its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seals and dated the 11th day of February, in the year of our Lord, 1910.

The condition of this obligation is such that whereas the said defendants above named have obtained a decree in the circuit court of the United States for the southern district of New York, sustaining the defendants' demurrer and dismissing the bill of complaint of the complainants with costs, which said decree was entered on the 11th day of February, 1910; and whereas the said com-
34 plainants, Arthur Lyman and Arthur T. Lyman, as said trustees, in order to obtain a reversal of the same, hath obtained the allowance in open court of a petition of appeal to the Supreme Court of the United States:

Now, therefore, if the above named Arthur Lyman and Arthur T. Lyman shall prosecute their said appeal to effect and if they fail to make their plea good shall answer all damages and costs, then

this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest:
GEORGE A. HAYES, *Attorney-in-Fact.*

Approved by
ALFRED C. COXE,
Circuit Judge.

35 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

Fidelity, Judicial, Contract, Burglary.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Arthur Lyman and Arthur T. Lyman, as Trustees, etc., as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Arthur Lyman and Arthur T. Lyman, as Trustees, etc., is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney-in-fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

[SEAL.] SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 11th day of February, 1910.

DANIEL C. DEASY, [SEAL.]
Notary Public, New York County.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

36 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to thirty-five inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Arthur Lyman and Arthur T. Lyman, as Trustees under the Last Will and Testament of George Baty Blake, deceased, Complainants-Appellants, against Interborough Rapid Transit Company, August Belmont, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt and George W. Young, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of February, in the year of our Lord One Thousand Nine Hundred and Ten and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

37 [Endorsed:] United States Supreme Court. Arthur Lyman and Arthur T. Lyman, as Trustees under the Last Will and Testament of George Baty Blake, deceased, Compl'ts-Appellants, vs. Interborough Rapid Transit Company and others, Def'ts-Appellees. Transcript of record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,022. S. New York C. C. U. S. Term No. 793. Arthur Lyman and Arthur T. Lyman, as trustees under the last will and testament of George Baty Blake, deceased, appellants, vs. Interborough Rapid Transit Company et al. Filed February 16th, 1910. File No. 22,022.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES OF THE LAST WILL AND TESTAMENT OF GEORGE BATY BLAKE, DECEASED, APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE UNDER RULE 26.

To the Honorable the Chief Justice and Associates of the Supreme Court of the United States:

1.

This appeal involves the constitutionality of the act of Congress of August 5, 1909, imposing an excise tax upon corporations proportionate to their net earnings. The con-

stitutionality of this law is raised in the case of Flint *vs.* Stone Tracy Company *et al.*, No. 747, and other cases which have been set down for hearing on March 14, 1910; but the present appeal contains certain features that are not embodied in any of those cases. The Interborough Rapid Transit Company, the defendant below, is a corporation organized under an act of the New York Legislature, known as "The Rapid Transit Act," for the express purpose of operating and maintaining a rapid transit railroad in the city of New York built with the city's money and owned by the city. Under the terms of the operating agreement with the city the Interborough Company is compelled to pay the interest upon the bonds issued by the city to defray the cost of construction and one per centum (1%) per annum of the principal amount, in the form of a sinking fund. The public character of the company is also shown by a provision of the act under which it was incorporated, exempting not only the rapid transit railroad itself from taxation, but also the Interborough Company's interest in the railroad and the equipment owned by the Interborough and employed in its operation. The funded debt of the Interborough Company also exceeds its capital stock.

2.

There are thus fairly presented the questions, over and beyond those presented by other pending appeals:

(*a*) Whether the tax is not a tax upon a corporation that is in effect an agency of a State government for the purpose of carrying on what is a municipal and therefore a State enterprise.

(*b*) Whether there is an unconstitutional inequality or discrimination against the defendant-appellee as compared with other corporations whose capital stock exceeds their funded debt, by reason of the fact that the Interborough's capital stock is less than its funded debt, and that it does

not, therefore, enjoy the advantage such other companies do of being able to deduct the *full* interest paid upon its funded debt, in ascertaining its net earnings under the law.

3.

The defendant, the Interborough Company, having refused to subject the company to the penalties for failure to comply with the provisions of the law requiring it to make returns and pay the tax in question, the action below was instituted against it by a non-resident stockholder, upon the ground that the act was unconstitutional for the reasons stated, and also under Article I, sections 2 and 8, and Articles IV and V of the Constitution of the United States and the Tenth Amendment thereto. The matter in dispute exceeds two thousand dollars ($2,000).

4.

A demurrer to the complaint having been sustained, an appeal was prayed to this court and allowed; but unless the appeal can be heard and determined before June 30, 1910, the defendant will voluntarily pay the tax in question, and the complainants-appellant will be remediless and unable to obtain relief, even though this court should later determine the act to be unconstitutional.

5.

The complainants-appellant therefore pray this honorable court that this case be advanced upon the docket and set down for hearing on the 14th of March, 1910, at the same time that the case of Flint *vs.* Stone Tracy Company and the other cases involving the constitutionality of the act in question are to be heard.

Notice of this motion has been served on counsel for the

defendant-appellee, and proof of service filed with the clerk of this court.

Respectfully submitted,

RICHARD REID ROGERS,
Of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

ARTHUR LYMAN and ARTHUR T. LYMAN, *as Trustees of the Last Will and Testament of George Baty Blake, Deceased, Appellants,*

vs.

INTERBOROUGH RAPID TRANSIT COMPANY *et al., Appellees.*

SIR: Please to take notice that on the bill of complaint and the demurrer herein, and on the decision of Mr. Justice Coxe, sustaining said demurrer and dismissing the bill of complaint with costs, the undersigned will move this honorable court, at its session on Monday, the 21st day of February, 1910, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order advancing this cause, under rule 26, so as to set the same down for argument on March 14, 1910.

Yours, etc.,

EVAN SHELBY,
Solicitor for Appellants, 46 *Cedar Street, Borough of Manhattan, New York City, New York.*

To JAMES L. QUACKENBUSH, Esq., solicitor for appellees. 165 Broadway, New York city.

[Endorsed:] Supreme Court of the United States. Arthur Lyman and Arthur T. Lyman, as trustees of the last will and testament of George Baty Blake, deceased, appellants, *vs.* Interborough Rapid Transit Company *et al.*, appellees. Notice of motion. Evan Shelby, solicitor for appellants, 46 Cedar street, borough of Manhattan, the city of New York. New York. Due and timely service of the within notice of motion is hereby admitted this 15th day of February, 1910. James L. Quackenbush, attorney for appellees.

[Endorsed:] File No. 22,022. Supreme Court U. S., October term, 1909. Term No. 796. Arthur Lyman *et al.*, trustees, &c., app'ts, *vs.* Interborough Rapid Transit Co. *et al.* Motion to advance. Filed Feb. 16, 1910.

Office Supreme Court U. S.
FILED
MAR 10 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM,

442

No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, deceased, APPELLANTS.

vs.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Involving the power of Congress to tax the franchises of a State corporation chartered to operate a rapid transit railroad owned by the City of New York.

BRIEF FOR APPELLANTS.

RICHARD REID ROGERS,
Of Counsel for the Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, NO 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GEORGE BATY BLAKE, DECEASED, APPELLANTS.

VS.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Appellants.

In 1891 the Legislature of the State of New York enacted a law known as the "Rapid Transit Act" (Laws of 1891, Chapter 4), whereby it was provided that cities having a population in excess of one million inhabitants, through Boards to be known as Rapid Transit Commissioners, might establish routes, obtain the necessary consents of the local authorities and property owners, prepare plans and specifications, and enter into contracts for the construction of underground rapid transit railroads. Under a subsequent provision of the law (Law of 1894, chapter 752, section 63), authorizing the submission of the question to the people, the citizens of New York City determined

that the subways of that City should be constructed for and at the expense of the City. A contract was thereupon entered into with one John B. McDonald for the construction of the subways and their maintenance and operation, for a period of 50 years. Sections 11 to 24, inclusive, of the Rapid Transit Act, contemplated, however, the organization of a corporation "to construct and operate such rapid transit railway or railways and to enjoy and exercise the rights and privileges and franchises in this Act provided for." Under authority of this provision the respondent was therefore incorporated upon May 6, 1902, and on July 10, 1902, under authority of law, received from McDonald an assignment of the operating part of his contract with the City, the construction part of which was carried out by McDonald in person. The Interborough Company thereupon provided the equipment necessary for the operation of the subways and since that time has been exclusively engaged in the rapid transit business in New York City. Section 35 of the Rapid Transit Act, under which the subways were constructed and the Respondent incorporated, provided that the corporation contracting to operate the subways "shall be exempt from taxation with respect to its interest under said contract and with respect to the rolling stock and all other equipment of said road"; and this exemption has been sustained by the Courts of New York in the case of the *People ex. rel. Interborough Rapid Transit Company* v. *State Board of Tax Commissioners*, 126 App. Div., 610, s. c. 195 N. Y., 618. Since the original subway was put into operation, an extension thereof under the East River into Brooklyn has been constructed and is now likewise operated by the respondent. The respondent's capital stock has a par value of $35,000,000, and its average fixed indebtedness during the year ending December 31,

1909, was $36,677,667. The tax that the company would be compelled to pay for the last calendar year, after making all deductions to which it would be entitled under the Act of Congress imposing the special excise tax upon corporations, would exceed $50,000.

The appellants, stockholders of the respondent, and representing a large majority of the stockholders of that company, believing that the tax imposed upon the company by the Act in question was both unconstitutional in its general aspects, and if not broadly unconstitutional was at least unconstitutional in so far as it applied to the Interborough Rapid Transit Company, an agency of the State Government engaged in carrying on a public undertaking, requested the Directors not to make the return nor to pay the tax required by the law in question. The Directors having in view, however, the fact that the constitutionality of the law, either generally speaking, or with respect to this particular company, had not been passed upon by any court of competent authority, declined to subject the corporation to the penalties imposed by the law for failure to comply therewith. The present proceeding was thereupon taken out and the case has been brought into this court. The error assigned is the unconstitutionality of the Act of Congress of August 5, 1909.

In view of the large number of counsel who will appear in other cases before this court involving the same general questions, it is not proposed in this brief to argue all of the aspects of this case from which it might appear that the Act of Congress of August 5, 1909, was unconstitutional. On this particular appeal the discussion will be confined to the following propositions:

(1) The Act of Congress is unconstitutional, inasmuch as in effect it imposes a tax upon the reserved powers of the States to create corporations

and endow them with franchises which are in themselves attributes of sovereignty.

(2) The Act of Congress is unconstitutional with especial respect to the Interborough Rapid Transit Company, the respondent herein, inasmuch as it imposes a tax upon a public agency engaged in carrying on a municipal, and therefore, under the decisions of this Court, a State enterprise.

(3) The Act of Congress is unconstitutional insofar as it attempts to impose a tax upon the franchises of foreign corporations, or at least upon their right to carry on a purely intra-state business — a matter over which the Federal Government has no control. The whole Act, therefore, must fail, inasmuch as it cannot be assumed that Congress intended to pass a law which would place state corporations at a disadvantage with respect to foreign corporations engaged in the same character of business.

(4) The tax is so unequal that by definition it is not such a tax as Congress has the delegated power to impose.

The argument of this brief will be centered principally upon the second of the foregoing propositions.

Nature of the Tax.

The Act of Congress provides generally that every corporation "shall be subject to pay a special excise tax with respect to the carrying on or doing business by such corporation, equivalent to 1 per centum upon the entire net income over and above $5,000 received by it from all sources during the year." Is the tax thus imposed (a), a tax upon corporate income; (b) an occupation tax; (c) a tax

upon franchises as property; or (d) a tax upon the existence of corporations or partnership associations as such, or, as it is sometimes expressed, a tax upon the right to do business in a corporate or associated form?

If, following the suggestion of this court in the case of *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S., 580, 583, the substance and not the letter of the Statute be regarded and the tax be looked upon as a tax upon *income*, it must necessarily follow that the tax is unconstitutional because in many cases it will be found to be a tax upon the income of corporations derived from real or personal property or municipal securities or other property beyond the taxing power of Congress, and is not apportioned among the States according to population. In the particular case of the Interborough Rapid Transit Company, if the tax be a tax imposed upon its income, it is proper to point out that its income is derived almost exclusively from its special franchises, and that these franchises are expressly declared by the laws of the State of New York (Laws of 1896, chapter 908, subdivision 3, as amended by Laws of 1899, chapter 712) to be real estate.

The tax, however, in terms, purports to be "a special excise tax with respect to the carrying on or doing business" by corporations. If a tax imposed upon the deposits of a savings bank is a tax upon the franchise of the bank, as was held in *Society for Savings* v. *Coit*, 6 Wall., 594, or, if a tax upon the accounts of depositors equal to a given percentage of the amount of the deposits is likewise a franchise and not a property tax, as was held in *Provident Institution* v. *Massachusetts*, 6 Wall., 611, or if a tax upon the dividends or coupons payable by a corporation is an excise tax on the corporation as was held in *R. R.* v. *Collector*, 100 U.

S., 595, 598, it would seem that a tax which by its terms, purports to be an excise tax, should be so regarded. Assuming then that the tax in controversy is an excise tax and, therefore, need not be apportioned among the States according to population, the particular thing upon which this excise tax is imposed, remains to be considered.

In this aspect it seems certain that the tax cannot be considered an *occupation* tax, such as was the tax imposed upon "every person, firm, corporation or company carrying on or doing business of refining sugar," which was considered by this Court in *Spreckles Sugar Refining Co.* v. *McLain*, 192 U. S., 397, and held to be an excise tax "in respect of the carrying on or doing business of refining sugar." The law clearly does not impose any tax upon any business or any occupation as *such*. This follows not only from the obvious fact that no business or occupation is specified, but also from the circumstance that if any occupation or business were in fact subjected to the tax, every person engaged in that occupation or business would have to pay it, whereas under the law as it stands, only corporations and joint stock companies or associations pay the tax, and that quite irrespective of the business or occupation in which they may be engaged.

Neither does it seem possible to infer that the tax imposed by the Act of Congress is a tax upon corporate franchises as *property*. It is undoubtedly true that the courts have recognized the distinction between the sovereign franchises of a corporation, or its right to be a corporation, and the special franchises enjoyed by it which are treated as property and which may be separately taxed. *Farrington* v. *Tenn.*, 95 U. S. 679, 687; *Veazie Bank* v. *Fenno*, 8 Wall., 533, 548. But if this be true, it is nevertheless manifest that corporate franchises under the Act of Congress under consideration are not taxed

as property, inasmuch as, quite to the contrary, the language of the Act imposes an excise tax upon corporations with respect to their carrying on or doing business. If the tax were indeed a *direct* tax upon franchises as *property*, it would then follow that the law must be unconstitutional, particularly with respect to the corporation involved upon this appeal, because the tax is not apportioned according to population. The principal franchise enjoyed by the Interborough Company, is its franchise to operate a public service rapid transit railroad under the streets of the City of New York; and this franchise, as already stated, has been expressly declared by the State of New York to be real property.

The tax, therefore, can only be a indirect tax upon the right to do business as a corporation; and such, indeed, is the tax by the definition of the statute itself.

We are thus brought to the consideration of the first point.

I

THE ACT OF CONGRESS IS UNCONSTITUTIONAL, INASMUCH AS IN EFFECT IT IMPOSES A TAX UPON THE RESERVED POWERS OF THE STATES TO CREATE CORPORATIONS AND ENDOW THEM WITH FRANCHISES WHICH ARE IN THEMSELVES ATTRIBUTES OF SOVEREIGNTY.

The tax in terms is a tax imposed upon corporations with respect to their carrying on or doing business; but it is obvious that it is really a tax upon the power of the State governments to *create* corporations, inasmuch as if a corporation can be taxed as such for carrying on its business as a corporation, and if the power to tax involves, as has been so often stated by this Court, the power to de-

stroy, then, necessarily, the power of States to create corporations may likewise be destroyed under the guise of a similar taxation.

For of what value would be a grant of corporate franchises to a private corporation, if the corporation in the very act of enjoying those franchises could be taxed out of existence? The argument at this point clearly falls under the principle so often asserted by this Court, and aptly stated by Justice BROWN, in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S., 601, 691, that "a tax upon an incident to a prohibited thing is a tax upon the thing itself; and if there be a total want of power to tax the thing, there is an equal want of power to tax the incident." See *Brown* v. *Maryland*, 12 Wheat., 419, holding that a license tax upon an importer was a tax upon imports; *Weston* v. *Charleston*, 2 Pet., 449, that a tax upon stock for loans to the United States was a tax upon the functions of the Government; *Dobbins* v. *Commissioners*, 16 Pet., 435, that a tax upon the salary of an office was a tax upon the office itself; *Passenger Cases*, 7 How., 283, that a tax upon alien passengers arriving in ports of the State was a tax upon commerce; *Almy* v. *California*, 24 How., 169, that a stamp tax upon bills of lading was a tax upon exports; *Crandall* v. *Nevada*, 6 Wall., 35, that a tax upon railroads and stage companies for every passenger carried out of the State was a tax on the passenger for the privilege of passing through the State; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S., 34, that a tax upon Pullman cars running between different States was a tax upon interstate commerce; *Leloup* v. *Mobile*, 127 U. S., 640, that a license tax upon telegraph companies was likewise a tax upon interstate commerce; and *Cook* v. *Pennsylvania*, 97 U. S., 566, that a tax upon the sale of goods was a tax upon the goods themselves.

Now, that a grant of a corporate franchise is, (a) the exercise of a sovereign faculty, and (b) that this power was not alienated by the several States to the national Government, are propositions too plain for discussion.

a. In *California* v. *Pacific R. R. Co.*, 127 U. S., 1, 40, Justice BRADLEY, speaking for this Court, inquired:

> "What is a franchise? Under the English law, Blackstone defines it as 'a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject.' (2 Bl. Com., 37.) Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No

> persons can make themselves a body corporate and politic, without legislative authority. Corporate capacity is a franchise."

b. Upon the other hand, in *Briscoe* v. *Bank of Comth. of Ky.*, 11 Peters, 257, this Court held that a State possessed the power to charter a bank, that the power was an incident to sovereignty, and that there was no limitation in the federal Constitution on its exercise by the State.

The language of the dissenting judges in *Veazie Bank* v. *Fenno*, 8 Wall., 533, 555, is likewise pertinent in this connection, inasmuch as on this point they did not express a doctrine upon which the majority was in disagreement with them. After commenting upon the effect of the decision in *Briscoe* v. *Bank of the Commonwealth of Ky.*, as stated above, they went on to say:

> "As we have seen, in the forepart of this opinion, the power to incorporate banks was not surrendered to the Federal Government, but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them. The question as to the taxation of the powers and faculties belonging to governments is not new in this Court."

The justices complained that the effect of the main decision was not only to strike down the power to create banks, but

> "the power to create any other description of corporations, such as railroads, turnpikes, manufacturing companies, and others,"

and that the

> "taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority."

The main opinion in *Veazie Bank* v. *Fenno*, evaded this issue, although it conceded that when franchises were conferred for the purpose of giving effect to some reserved power of a State they were not proper objects for taxation.

If, then, the tax is essentially a tax imposed upon the full enjoyment of a sovereign prerogative, and is therefore, a tax upon the exercise by the sovereign of the right to confer that prerogative; if this right is a reserved right of the several States under the Constitution; and if the Federal taxing power, though comprehensive in terms, is yet so circumscribed that it cannot be employed to destroy the exercise by the States of a sovereign function;—it necessarily follows that the law in question is unconstitutional.

A fresh light, however, will be thrown upon this subject, if we consider those cases in which it has been held that the States cannot even *indirectly* tax a corporate franchise granted by the national Government; and then turn to the consideration of the converse proposition that a franchise of the Federal Government is entitled to no greater protection from the States than is a franchise of any one of the States from the Federal Government.

McCulloch v. *Maryland*, 4 Wheat., 316, holding that the State of Maryland might not tax the notes of the banks of the United States, is the earliest

and the greatest case which establishes the first postulate of this syllogism. But there are others—*Osborne* v. *Bank of U. S.*, 9 Wheat., 768; *Brown* v. *Maryland*, 12 Wheat., 419; *Weston* v. *The City of Charleston*, 2 Pet., 449; *Bank of Commerce* v. *New York*, 2 Black., 628; *Bank Tax Case*, 2 Wall., 200; *Owensboro National Bank* v. *Owensboro*, 173 U. S., 664; *Davis Bank of Louisville* v. *Stone*, 174 U. S., 932; culminating in *California* v. *Pacific R. R., Co.*, 127 U. S., 41—perhaps even more pertinent. How firmly the doctrine has been established by this Court, may be gathered from the forcible language employed by Justice BRADLEY, in delivering the opinion of the Court in the case last mentioned:

> "Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States, may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject."

This case, it should be borne in mind, was not a case involving the protection of the corporate powers of a corporation of the United States, but the protection of a franchise—a franchise to extend its road as a connecting link of interstate commerce from California to Utah—that was bestowed upon a State corporation by an Act of Congress. The foregoing passage from Justice BRADLEY's opinion was quoted with approval by this Court in *Central Pacific R. R. Co.* v. *California*, 162 U. S., 91, 124, where the Court concluded:

> "Thus it was reaffirmed that the property of a corporation of the United States might be taxed, though its franchises, as, for instance, its corporate capacity and its power to transact its appropriate business and charge therefor, could not be."

In view of these decisions, it would seem to be impossible to doubt the invalidity of an Act of the State of New York, which, over the objection of the Congress of the United States, might impose a tax upon a corporation organized by the United States for the purpose of building, let us say, an interstate railroad through the State of New York, with respect to "the carrying on or doing business by such corporation." See *Leloup* v. *Port of Mobile*, 127 U. S., 640, 648. Indeed, the decisions of this Court may be said to establish the proposition that, while the franchises of a corporation of the United States may never be taxed by a State government, not even the property of a corporation of the United States may be taxed if Congress should declare it to be exempt.

In *Thomson* v. *Pacific R. R.*, 9 Wall., 579, 588, Chief Justice CHASE, delivering the opinion of the Court, said:

> "We do not doubt, however, that upon the principles settled by that judgment (*McCulloch* v. *Maryland*), Congress may, in the exercise of powers incidental to the express powers mentioned by counsel (power to regulate commerce and establish post-offices and post-roads), make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; *and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.*"

And in *Central Pacific R. R.* v. *California, supra*, the Court was careful to say:

> "Of course, if Congress should think it necessary for the protection of the United States to declare such property exempt [the property of federal corporations] that would present a different question."

But if a State government cannot tax the franchises or operations of a national corporation chartered to assist the National Government in the discharge of a delegated power, by what better right may the National Government tax the franchises or operations of a State corporation chartered to assist a State Government in the discharge of a reserved power?

If any rule of correlative limitations between the Government of the United States and the governments of the respective States were well established, it would seem to be this: that in the respect stated, the State and Federal Governments are upon an equal footing. The authorities to this effect are numerous and to the point: *Collector* v. *Day*, 11 Wall., 113, 128; *R. R. Co.* v. *Peniston*, 18 Wall., 30; *Van Brocklin* v. *Tenn.*, 117 U. S., 151, 162; *The Income Tax Cases*, 157 U. S., 584; *Knowlton* v. *Moore*, 178 U. S., 41, 59; *Ambrosini* v. *U. S.*, 187 U. S., 1, 7; and *South Carolina* v. *U. S.*, 199 U. S., 487. They will be considered in detail in the discussion of the succeeding point of this brief. They may be said, however, to be epitomized in the early statement of the Court in *R. R. Co.* v. *Peniston*, 18 Wall., 1, 30, that:

> "While it is true that Government (the Government of the United States) cannot exercise its powers of taxation so as to destroy the State governments, or embarrass

> their lawful action, it is equally true that the States may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national Government."

It would, therefore, seem to follow that under the principle of reciprocity which forbids a State Government from taxing the franchises of a federal corporation, or its operations, the Federal Government is equally inhibited from taxing the franchises or operations of a corporation organized under the laws of one of the several States.

II.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL WITH ESPECIAL RESPECT TO THE INTERBOROUGH RAPID TRANSIT COMPANY, THE RESPONDENT HEREIN, INASMUCH AS IT IMPOSES A TAX UPON A PUBLIC AGENCY ENGAGED IN CARRYING ON A MUNICIPAL, AND THEREFORE, UNDER THE DECISIONS OF THIS COURT, A STATE ENTERPRISE.

The argument of the preceding point has been broad enough, if sound, to cover the case of all corporations organized under the laws of any State, in whatever business they may be engaged. It is now proposed to consider the special case of the Interborough Rapid Transit Company, and to show that, whatever the general rule, this company falls within the particular rule established by this Court, that Congress has not the power to tax the franchise of a State corporation expressly created for the purpose of carrying on a public work, and expressly exempted from taxation with respect to such portion of its property as may be engaged therein.

If, as has been held by numerous decisions of this Court, a railroad chartered by the Congress of the United States, employed to transport the mails of the United States, or its troops and munitions of war, and engaged in conducting broadly an interstate commercial business, notwithstanding the fact that its existence is due to private initiation, and its profits are distributed to private investors, is nevertheless an agency of the Federal Government, so that its right to exist and carry on its work cannot be taxed by any State government—upon what ground can it be justly claimed that the corporation involved in this appeal—the Interborough Rapid Transit Company—is not likewise a governmental agency engaged in carrying on a public enterprise for the City of New York? It has long since been established by the decisions of this Court that a municipality is but the arm of a State government, that a municipal undertaking is a public undertaking of the State itself, and that, therefore, municipal property and municipal agencies enjoy the same protection from Federal taxation as the property and agencies of the State of which the municipality is a mere subdivision. If any authority were needed to show that the Interborough Rapid Transit Company is a public agency in the broadest sense, in a sense equally as broad as that in which the Pacific Railroad companies for example have been asserted to be Federal agencies—it will be found in the Acts of the Legislature of the State of New York, which authorized it to be incorporated for the express purpose of bringing to the great metropolis of that State the sorely needed relief of rapid transit; and in the further provisions of the law, exempting from taxation, not only its personal property employed in the operation of the subways, its machinery, rolling stock and equipment, but also its contract interest in the road itself. This

exemption from taxation and the public character of this company have stood the test of the courts of the State of New York. In *People, ex rel., Interborough R. T. Co.* v. *Tax Commissioners*, 126 App. Div., 610, affirmed without opinion by the Court of Appeals of New York, there was involved the right of the Interborough Company to be exempt with respect to its special franchise to operate a railroad under the streets of New York City. The language of the Appellate Division in that opinion fully states the Company's case:

> "A special franchise of a railroad is its right to construct, maintain and operate a railroad in public streets, highways or public places. (*People, ex rel., Met. St. R. Co.* v. *Tax Comrs.*, 174 N. Y., 417, 435, 436.) By the Rapid Transit Law and the Acts amendatory and supplemental thereto, the special franchise as well as the road itself is the property of the City, and is merged in and became a part of the public highway for the public use.
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> * * * * *
>
> "The City itself was not given the power of a railroad corporation, and, was, therefore, incapable, except through the contract which the statute authorized, of making this public work available for public use. For the purposes of this case it is unnecessary to determine whether the relator is technically a lessee, an operator or a separate contractor who performs a public service which the City could perform only through the agency of another, and the performance of which it was its duty to provide. However the matter is viewed, we find a public highway, operated in the manner required by the statute and the commission in charge of it, the operator paying a fixed sum to the City for the use of the property and the bal-

ance of the fares are held by it for performing the public service.

* * * * *

"If the City had been given power to operate this road, it is clear that no franchise tax could be charged against it. As the City can only operate it through another, it would seem to follow that the operator for the City is also exempt from taxation. The general scheme of the statute under which this subway was built was: The City bonded itself to pay for the construction of the road, which bonds, with interest thereon, are to be paid by the operation of the road, so that at the end of the lease or contract for operation, the City will own the road free of cost. It was, therefore, necessary, in order to make the scheme available, to find a contractor who would agree to construct, maintain and operate the road upon terms which the statute permitted the City to make. A statute declaring the property of a municipality free from taxation, which property it can only use through the services of a special contractor or lessee, confers no benefit upon the City if the contractor or lessee is to be taxed for using the property, as the amount of the tax would necessarily affect the rental which the City may receive. The statutory exception, therefore, is meaningless, unless it exempts the property from taxation when applied to the only use and in the only manner in which the City could use it."

We, therefore, have in the present case not only an appropriate agency of the State for the purpose of carrying on a public enterprise, but an indispensable agency; for the municipality, as stated by the Appellate Division, had not the authority to operate the road itself, and the Rapid Transit Act of the State of New York provided that it could be operated only by a corporation organized under that Act.

Nor is the exemption from taxation important only as showing the public character of the Interborough Company. It is likewise important as an inhibition. If it be true, as stated in the cases cited under the foregoing point, that even the property owned in a private capacity by a corporation organized by the Government of the United States and engaged in a national undertaking cannot be taxed by a State, if the Federal Government should so declare, the statement is justified by the parity of reasoning which pervades the consideration of this whole question, wherever the correlative rights of the State and Federal governments are involved, that the solemn declaration of the State of New York that this corporation should not be taxed, withdraws it from the category of subjects upon which the Federal Government may justly impose an excise tax, even if that right otherwise existed.

The public character of this company having been thus defined by the legislature and the courts of New York, and being apparent from the nature of the Company, it is proper to now pass in review the cases in which the general principle has been asserted by this Court that the public agencies of a State, or of a municipality of a State, may not be taxed by the Federal Government.

In *Veazie Bank* v. *Fenno*, 8 Wall., 533, 547, where the Supreme Court sustained a tax of 10 per cent. upon the notes of State banks issued for circulation, upon the ground that the tax was a property tax, the Court nevertheless safeguarded the rights of the State in a situation, whereof the present case is a concrete example, by saying:

> "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agen-

> cies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress."

In *The Collector* v. *Day*, 11 Wall., 113, 125, it was held that the salary of a state judge was exempt from national taxation. The Court said:

> "It would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits, but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *United States* v. *Railroad Company*, 17 Wall., 322, was involved the right of the Federal Government to impose a tax on money due from the Baltimore & Ohio Railroad Company to the City of Baltimore. It was held that the City was a part of the State in the exercise of a limited portion of the State's powers and that the tax could not be sustained. The Court said (p. 327):

> "The right of the States to administer their own affairs through their legislative,

> executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization * * *

To the same effect was *United States* v. *Louisville*, 169 U. S., 249.

In *Mercantile Bank* v. *New York*, 121 U. S., 138, 162, it was held that the United States could not tax the bonds issued by a State, or under its authority, and held by private corporations.

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S., 429, 584, the only point upon which the entire court concurred, was upon the lack of authority to include as taxable income the income derived from interest on municipal bonds.

The foregoing cases on principle seem to be in point; but on the facts it may be admitted they are not so applicable to the situation of the Interborough Company as are those cases in which it has been held that a privately owned bank, organized under the laws of the United States by virtue of its power to regulate the currency, or a privately owned railroad company, chartered by Congress in the exercise of its power to regulate commerce between the States, is such an agency of the Government, that neither its franchises, its operations, nor, if so declared by Congress, its separately owned property, may be taxed by a State government.

These cases have already been partly cited in detail. Their general doctrine may be said to be aptly summarized by Chief Justice CHASE in *Van Allen* v. *The Assessors*, 3 Wall., 573, 591:

> "That Congress may constitutionally organize or constitute agencies for carrying into effect the national powers granted by the Constitution; that these agencies may be organized by the voluntary association of

> individuals, sanctioned by Congress; that Congress may give to such agencies, so organized, corporate unity, permanence, and efficiency; and that such agencies in their being, capital, franchises, and operations, are not subject to the taxing power of the States, have ever been regarded, since those decisions, as settled doctrines of this Court."

So likewise in *R. R. Co.* v. *Peniston*, 18 Wall., 1, 46, Justice BRADLEY, in his dissenting opinion, said:

> "Now, I think it cannot be doubted at the present day, whatever may have been contended in former times, that the creation of national roads and other means of communication between the States, is within the power of Congress in carrying out the powers of regulating commerce between the States, establishing post-offices and post-roads, and in providing for the national defense and for military operations in time of war. And no one will contend that, if the creation of a corporation is a suitable agency and means of carrying on the financial operations of the government, the creation of a corporation is equally apposite as an agency and means of carrying out the objects above mentioned."

And in *Luxton* v. *North River Bridge Co.*, 153 U. S., 525, 529, Justice GRAY, delivering the opinion of the Court, said:

> "The Congress of the United States, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end.
>
> * * * * * *
>
> "Congress, therefore, may create corpora-

> tions as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States."

See also in *U. S.* v. *Stanford*, 161 U. S., 412, and *U. S.* v. *Union Pacific R. R. Co.*, 91 U. S., 92.

Indeed, the analogies to be drawn from the decisions on federal franchises so completely cover the case of the Interborough Company that it becomes important to inquire more minutely than heretofore to what extent the rule of reciprocity as to the mutual exception of the governmental agencies of one government from taxation by the other has been established by the decisions of this Court. That a complete reciprocity does exist, notwithstanding an earlier dictum to the contrary, we think may now be said to be firmly settled by the force of the following authorities:

In *Collector* v. *Day*, *supra*, the whole decision was rested upon the application to the States of the converse of the proposition settled in *McCulloch* v. *Maryland*, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." Having first adverted to the dual system of State and Federal government under our Constitution the Court proceeded to say:

> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed

for carrying on the operations of their go
ernments * * * should be left free an
unimpaired, should not be liable to be cri
pled, much less defeated by the taxin
power of another government, which powe
acknowledges no limits, but the will of th
legislative body imposing the tax." * *

"And if the means and instrumentalitie
employed by that government to carry int
operation the powers granted to it are, ne
essarily, and, for the sake of self-preserv
tion, exempt from taxation by the State
why are not those of the States dependin
upon their reserved powers, for like reason
equally exempt from Federal taxation
Their unimpaired existence in the one cas
is as essential as in the other. It is ad
mitted that there is no express provision i
the Constitution which prohibits the ge
eral government from taxing the means an
instrumentalities of the States, nor is ther
any prohibiting the States from taxing th
means and instrumentality of that go
ernment. In both cases the exemptio
rests upon necessary implication, an
is upheld by the great law of sel
preservation; as any government, whos
means employed in conducting its op
erations, if subject to the control o
another and distinct government, can exis
only at the mercy of that government. O
what avail are these means if another powe
may tax them at discretion?"

The scope of this decision and the pertinency o
the principle to the exact issue presented on th
appeal may be gathered from the dissent of Justic
BRADLEY, wherein he queries—

"Where are we to stop in enumerating th
functions of the State governments whic
will be interfered with by federal taxation
If a State incorporates a railroad to carr
out its purposes of internal improvement, o

> a bank to aid its financial arrangements reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation?"

The reciprocity rule was next asserted in the case of *Railroad* v. *Peniston*, 18 Wall., 30, as follows:

> "While it is true that government (meaning the government of the United States) cannot exercise its powers of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government."

In *Van Brocklin & Another* v. *State of Tennessee & Others*, 117 U. S., 151, 162, the Supreme Court quoted with approval the statement of the reciprocity rule in *Fagan* v. *Chicago*, 84 Illinois, 227, 233, 234, as follows:

> "Nor under our system of government can the State tax the general government, its agents or property, nor can the general government tax the States, their agents or property."

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S., 429, 584, the rule was stated thus:

> "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

In *Knowlton* v. *Moore*, 178 U. S., 41, 59, the doctrine of reciprocity was recognized in the following language:

> "This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the National government or the instrumentalities employed to carry such powers into execution, and, conversely, that the same limitation rests upon the National government in relation to the powers of the several States."

In *Ambrosini* v. *United States*, 187 U. S., 1, 7, it was held that good behavior bonds required to be given by liquor dealers to the City of Chicago, were exempt from the stamp tax imposed during the Spanish-American War. The Court said:

> "The general principle is that the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the Federal Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter."

Even in the case of *South Carolina* v. *United States*, 199 U. S., 452, 453, 454, a case to which more extended reference will be hereafter made, it was fully recognized that:

> "the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers."

and that

> "Each State is subject only to the limitations prescribed by the Constitution and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that 'the United States shall guarantee to every state in this Union a republican form of government.' Art. 4, sec. 4. That expresses the full limit of National control over the internal affairs of a State."

It does not seem possible that the case of *South Carolina* v. *United States*, *supra*, was intended to establish an opposite rule or that in view of the many decisions already cited to the contrary, it can be cited as an authority for the proposition, that the particular corporation involved in the case under discussion, to wit, The Interborough Rapid Transit Company, cannot be properly looked upon as an instrument employed by the State, "in the discharge of its ordinary functions as a government." It is true that in that opinion, although against strong dissent, it was stated that the decisions already referred to seemed to indicate that the thought had been that the exemption of State agencies and instrumentalities of National governments was limited to those of a strictly governmental character, and did not extend to those which were used by the State in carrying on an ordinary private business. But assuming the correctness of this conclusion when applied to the case where the State or municipality engages in a private business primarily and principally for the sake of profit, it certainly has no application, unless the force of all the decisions heretofore adverted to be waived aside, to the case where the State or municipality derives no direct profit

from a special enterprise and where the enterprise itself is carried forward in order to promote an important public undertaking properly falling within the domain of the State's powers of internal regulation. The analogy so often referred to between the Pacific railroads and the subways of New York City is complete. In the case of Pacific railroads the actual profits from operation, as here, went chiefly to the corporations expressly chartered to carry on their operation, but so essential were they thought to be to the discharge of the general obligation assumed by the National government to foster and promote intercourse between the States, that the point was never seriously urged that they were not appropriate instrumentalities of National government to the accomplishment of that end. It is now too late to insist that a railroad built by a great City, owned by that City, and affording an absolutely indispensable facility for the daily intercourse of its citizens, is not likewise within the narrower limits of the internal affairs of State or City, which is an arm of the State, an appropriate agency of the State government. It would seem as though the case of the *United States* v. *Railroad Company*, 17 Wall., 322-330, should be conclusive upon this subject.

The City of Baltimore had subscribed to the bonds of the Baltimore & Ohio Railroad Company, and it was held that these bonds were beyond the power of the Federal Government to tax. Referring to the public character of this investment, this Court said:

> "That the State possessed the power to confer this authority upon the City, we see no reason to doubt.
>
> "Was it exercised for the benefit of the municipality, that is in the course of its

municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power? The legislature and the authorities of the City of Baltimore decided that the investment of $5,000,000 in aid of the construction of a railroad, which should bring to that City the unbounded harvests of the west, would be a measure for the benefit of the inhabitants of Baltimore and of the municipality. This vast business was a prize for which the States north of Maryland were contending. Should it endeavor by the expenditure of this money or this credit to bring this vast business into its own State, and make its commercial metropolis great and prosperous, or should it refuse to incur hazard, allow other States to absorb this commerce, and Baltimore to fall into an inferior position? This was a question for the decision of the City under the authority of the State. It was a question to be decided solely with reference to public and municipal interests. The City had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The State could do these things by the direct act of its legislature, or it could empower the City to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the City. It might be wise, or it might prove otherwise. The City was to reap the fruits in the advanced prosperity of all its material interests, if successful. If unsuccessful, the City was to bear the load of debt and taxation, which would surely follow. The City had the power given it by the legislature to de-

cide the question. It was within the scope of its municipal powers."

The authority of this case was crystallized into legislation by the Act of Congress of February 25, 893 (27 Stats., 477), directing a refund to the City of Louisville of the federal tax imposed under the Internal Revenue Act of 1864, upon the stock of the Louisville and Nashville R. R. Co. owned by the City. See *United States* v. *Louisville*, 169 U. S., 249.

Much other authority upon this point could be cited, but the power of subdivisions of a State Government, either counties, townships, or municipalities, to subsidize works of internal improvement, and, most of all, public improvements which facilitate the intercourse of citizens with each other, has long been an established principle of our polity. Had the principle not been early established and fully recognized, the vast development of this land and its political subdivisions could never have been assured, or must at least have been indefinitely postponed.

And this suggestion leads to another important aspect in which the South Carolina Dispensary case may be distinguished from the case at the bar. It was there held that the Constitution should be interpreted in the light of the circumstances surrounding its framers and it was suggested that when the Constitution was adopted, "there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plan of a body politic to take up the work of the individual or body corporate." It was therefore argued that when the framers of the Constitution conferred upon the National government

the power to impose license taxes, they could not have supposed that the State governments by extending their functions to ordinary commercial operations would limit or destroy this power; but this argument can scarcely be applied with respect to the ordinary routes of communication which from time immemorial have always been looked upon as proper objects of public ownership and of public control. At the time the Constitution was adopted, the nearest approach to the railroads of today, were the public roads of that era, and these were universally under the control of the State Governments or subdivisions of the State Governments. Canals and post-roads were already under governmental protection the world over, and although the power to establish post-roads was committed to Congress, there can scarcely be a doubt that the States recognized as well as retained their rights to improve the avenues of internal communication. It cannot, therefore, be said that when the Constitution was adopted its framers did not contemplate that the power of the State might be extended to the creation of improved facilities for travel and communication, and, indeed, the Constitution was scarcely in existence when, prior to the beginning of the railroads, an extensive system of artificial water communication was put into force chiefly through the aid or by the direct appropriations of the State Governments. New York was one of the first to exercise in this respect its governmental functions, and the Erie Canal was formally proposed as a State undertaking in the year 1791.

It is now proper to advert to the distinction made by Mr. Justice BRADLEY, in his dissenting opinion in *Railroad Company* v. *Peniston*, 18 Wall., 48, relying upon an observation made by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*, 4 Wheat., 405. Justice BRADLEY in endeavoring to

establish the proposition against the views of a majority of the court that not only the franchises of the Union Pacific R. R. Co., a National corporation, were exempt from State taxation, but the property owned by that corporation as well, was naturally led to consider the opposing argument that if the property as well as the franchises of a federal corporation were exempt from State taxation, the property as well as the franchises of a State corporation should likewise be exempt from Federal taxation. He stated this question as follows:

> "But, it may be asked, if the States cannot tax a United States corporation created for public and national purposes, on what principle can the General government tax local corporations created by the State governments for local and State purposes? If the States cannot tax a National bank, how can the United States tax a State bank? The answer is very manifest, and is stated by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*."

The learned Justice then proceeded to quote several extracts from *McCulloch* v. *Maryland*, of which the following was the most important:

> "It has also been insisted that, as the power of taxation in the General and State governments is acknowledged to be concurrent, every argument which would sustain the right of the General government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the General government. But the two cases are not on the same reason. The people of all the States have created the General government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by

> their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

Manifestly the language employed by Chief Justice MARSHALL was unnecessary to the decision of the case before the Court. In answer to it, it can only be said that this dangerous dictum, notwithstanding the elevated source from which it proceeded, has never been applied as a principle of any decision rendered by this tribunal. Indeed, the long line of cases beginning with *Collector* v. *Day*, 11 Wall., 113, 125, summarized above, are a direct negation of this doctrine.

The third and fourth propositions set forth in the beginning of this brief may be briefly stated.

III.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL IN SO FAR AS IT ATTEMPTS TO IMPOSE A TAX UPON THE FRANCHISES OF FOREIGN CORPORATIONS, OR AT LEAST UPON THEIR RIGHT TO CARRY ON A PURELY INTRASTATE BUSINESS—A MATTER OVER WHICH THE FEDERAL GOVERNMENT HAS NO CONTROL. THE WHOLE ACT, THEREFORE, MUST FAIL, INASMUCH AS IT CANNOT BE ASSUMED THAT CONGRESS INTENDED TO PASS A LAW WHICH WOULD PLACE STATE CORPORATIONS AT A DISADVANTAGE WITH RESPECT TO FOREIGN CORPORATIONS ENGAGED IN THE SAME CHARACTER OF BUSINESS.

The Act of Congress of August 5, 1909, imposes a tax not only upon corporations of the United States or any State or Territory thereof, but also a special excise tax with respect to the carrying on and doing business of any corporation organized under the laws of any foreign country.

It is a proposition too plain for comment that no state can subject a non-resident to its sovereignty. It certainly is beyond the power of the Federal government to tax the franchises, for example, of a corporation of Great Britain. If the tax upon foreign corporations, therefore, is to be sustained, it must be upon the theory that the National government has authority to license foreign corporations to do business within the geographical limits of a State of the union. Indeed, the tax in terms purports to be a tax upon the right of a foreign corporation to carry on or do business within the United States, or any State or Territory thereof. If this right can be sustained, then it clearly falls within the power of the Federal government to prohibit by taxation a foreign corporation from transacting a wholly domestic business within the limits of any

State of the United States. It can, for example, impose a tax upon the admission of a foreign Insurance Company to underwrite risks in the State of New York, and it can thus withdraw from the State the right to regulate its own internal commerce, a right which from the earliest days of the Republic has been universally conceded to lie within the sole jurisdiction and regulation of the several States. The authority of Congress to tax under any appropriate form an established business or occupation within its jurisdiction may be conceded; but it does not seem possible that any successful contention can be made that will uphold the authority of the United States to tax either the franchises of foreign companies as such or their primary right to carry on business of an exclusively domestic character within any given State. "The power to authorize a business within a state is plainly repugnant to the exclusive power of the State over the same subject." *License Tax Cases*, 5 Wall., 462, 471. See also *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S., 204, 210. The law, therefore, insofar as it applies to such companies, would seem to be unquestionably a law not lying within the delegated powers of the Federal government to enact.

But if that be true, the whole law would likewise seem to fail upon the principle sustained in the *Income Tax* cases, that where certain important sections of a law, constituting an entire scheme of taxation, are necessarily invalid, the whole law must fall, because it cannot be assumed that the Legislature would pass the residuum independently of the parts which are held to be unconstitutional. There is a special force in the application of this principle to the law in question, provided the tax upon foreign corporations cannot be enforced, as, otherwise, all foreign corporations doing business

within the confines of any State in the Union would have a distinct preference over domestic corporations—to wit, an exemption from taxation which domestic corporations could not enjoy. It certainly could not be assumed that Congress could have intended to produce any such result as this, or, that with any such situation before it, it would have enacted any part of the present scheme imposing a special franchise tax upon corporations.

IV.

THE TAX IS SO UNEQUAL THAT BY DEFINITION IT IS NOT SUCH A TAX AS CONGRESS HAS THE DELEGATED POWER TO IMPOSE.

It is true that the provision of Article I, Section 8, of the Constitution, that excise taxes must be uniform throughout the United States, has been held by this Court to mean a geographical uniformity. It is not, therefore, upon this section that the proposition is rested that the present law is unconstitutional, because unequal. The primary power delegated to the Federal government to impose taxes, carries with it the necessary implication that those taxes should be substantially uniform and equal, or, if unequal in part, that the inequality should be based upon some rational and clearly understand principle. It might be that the exemption of one particular corporation from taxation where another is taxed may stand upon a rational basis. It may be that the exemption from taxation of corporations enjoying a net income of less than $5,000 a year is a rational exemption, inasmuch as it might be assumed that such weaker corporations should be fostered and encouraged; but the inequalities in the present law

far transcend the principle of a rational inequality, and where they do not transcend that principle, clearly invade the jurisdiction reserved to the several States.

To illustrate: The present company does not enjoy the right, with other corporations, in arriving at the amount of tax it will have to pay to deduct the interest upon its bonded debt in excess of its capital stock. The only rational ground upon which this discrimination against corporations whose fixed indebtedness exceeds their capital stock can be rested, must be the ground that in the furtherance of a wise public policy it is advisable to restrict the indebtedness of corporations to an amount which shall not exceed their capital stock. This principle, indeed, has been made effective by recent legislation in several States; but the power thus exercised is a power which it exclusively lies within the province of the States to exert, for it is elementary that the regulation of domestic corporations is not confided to the national legislature.

Again only corporations engaged in a certain character of business are taxed. Labor, agricultural and horticultural organizations, fraternal and benevolent societies and domestic building and loan associations, are exempted from the operation of the law. If these exemptions are justified it would likewise be possible for the Federal government to exempt from the operation of the law any other class of corporations. Railroad corporations, for example, might be either exempted or included, and insurance companies vice versa might be either included or exempted. Indeed, it would be possible for the Federal government to impose the corporation tax solely upon public service corporations such as the Interborough Rapid Transit Company, here, exempting from its operations, corporations of all other classes. In seeking, however, a con-

crete illustration of the inequality of this law nor
better indeed is to be found than that broad i
equality frankly recognized by the law itself, whic
taxes the artificial entity known as a corporatio
when engaged in an industry or a partnership, whe
organized in the form of a partnership associatio
and exonerates from taxation all other characte
of partnerships and all individuals engage
in the same business. It ought not to be doubte
that an Act of Congress which imposed a tax upo
dark haired persons and exempted from taxatio
persons of light complexion, would be beyond th
powers conferred upon Congress to impose a tax
but if this proposition be true, it can hardly b
seen how the power resides in Congress to impos
upon corporations alone a tax so unequal in i
bearing upon the business life and industry of th
country as is the tax now before the Court.

Conclusion.

In concluding the argument of this case, th
writer ventures to recall this Court's own cha
acterization of the equal balance it has ever mai
tained in adjusting the delicate relations existi
between State and National governments, with r
spect to their independent sovereign powers. In th
Slaughterhouse Cases, 16 Wall., 36, 82, this Cou
closed as follows:

> "Under the pressure of all the excite
> feeling growing out of the war, our state
> men have still believed that the existence
> the States with powers for domestic and l
> cal government, including the regulation
> civil rights—the rights of person and
> property—was essential to the perfect wor
> ing of our complex form of governmen
> * * *
>
> "But whatever fluctuations may be see

in the history of public opinion on this subject during the period of our national existence, we think it will be found that this Court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."

Respectfully submitted,

RICHARD REID ROGERS,
of Counsel for Appellants.

Office Supreme Court U. S.
FILED
JAN 16 1911
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM.

No. ~~796.~~ 442

ARTHUR LYMAN AND ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, deceased, APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY *Et Al.*

Appeal from the Circuit Court of the United States for the Southern District of New York.

Involving the power of Congress to tax the franchises of a tax exempt State corporation especially chartered to operate a rapid transit railroad owned by the City of New York.

BRIEF OF APPELLANTS ON RE-ARGUMENT.

RICHARD REID ROGERS,
Of Counsel for the Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GEORGE BATY BLAKE, DECEASED, APPELLANTS,

VS.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANTS ON RE-ARGUMENT.

In 1891 the Legislature of the State of New York enacted a law known as the "Rapid Transit Act" (Laws of 1891, Chapter 4), whereby it was provided that cities having a population in excess of one million inhabitants, through Boards to be known as Rapid Transit Commissioners, might establish routes, obtain the necessary consents of the local authorities and property owners, prepare plans and specifications, and enter into contracts for the construction of underground rapid transit railroads. Under a subsequent provision of the law (Law of 1894, chapter 752, section 63), authorizing the submission of the question to the people, the citizens of New York City determined that the subways of that City should be constructed for and at the expense of the City. A contract was

thereupon entered into with one John B. McDonald for the construction of the subways and their maintenance and operation, for a period of 50 years. Sections 11 to 24, inclusive, of the Rapid Transit Act, contemplated, however, the organization of a corporation "to construct and operate such rapid transit railway or railways and to enjoy and exercise the rights and privileges and franchises in this Act provided for." Under authority of this provision the respondent was therefore incorporated upon May 6, 1902, and on July 10, 1902, under authority of law, received from McDonald an assignment of the operating part of his contract with the City, the construction part of which was carried out by McDonald in person. The Interborough Company thereupon provided the equipment necessary for the operation of the subways and since that time has been exclusively engaged in the rapid transit business in New York City. Section 35 of the Rapid Transit Act, under which the subways were constructed and the respondent incorporated, provided that the corporation contracting to operate the subways "shall be exempt from taxation with respect to its interest under said contract and with respect to the rolling stock and all other equipment of said road"; and this exemption has been sustained by the Courts of New York in the case of the *People ex rel. Interborough Rapid Transit Company* v. *State Board of Tax Commissioners*, 126 App. Div., 610, s. c. 195 N. Y., 618. Since the original subway was put into operation, an extension thereof under the East River into Brooklyn has been constructed and is now likewise operated by the respondent. The respondent's capital stock has a par value of $35,000,000, and its average fixed indebtedness during the year ended December 31, 1909, was $36,677,667. The tax that the company would be compelled to pay for the last calendar year, after making all deductions to which it would

be entitled under the Act of Congress imposing the special excise tax upon corporations, would exceed $50,000.

The appellants, stockholders of the respondent, and representing a large majority of the stockholders of that company, believing that the tax imposed upon the company by the Act in question was both unconstitutional in its general aspects, and if not broadly unconstitutional was at least unconstitutional in so far as it applied to the Interborough Rapid Transit Company, an agency of the State Government engaged in carrying on a public undertaking, requested the directors not to make the return nor to pay the tax required by the law in question. The directors having in view, however, the fact that the constitutionality of the law, either generally speaking, or with respect to this particular company, had not been passed upon by any court of competent authority, declined to subject the corporation to the penalties imposed by the law for failure to comply therewith. The present proceeding was thereupon taken out and the case has been brought into this court. The error assigned is the unconstitutionality of the Act of Congress of August 5, 1909.

In view of the large number of counsel who will appear in other cases before this court involving the same general questions, it is not proposed in this brief to argue all of the aspects of this case from which it might appear that the Act of Congress of August 5, 1909, was unconstitutional. On this particular appeal the discussion will be confined to the following propositions:

(1) The Act of Congress is unconstitutional, inasmuch as in effect it imposes a tax upon the reserved powers of the States to create corporations and endow them with franchises which are in themselves attributes of sovereignty.

(2) The Act of Congress is unconstitutional with especial reference to the Interborough Rapid Transit Company, the respondent herein, inasmuch as it imposes a tax upon a public agency engaged in carrying on a municipal, and therefore, under the decisions of this Court, a State enterprise.

(3) The Act of Congress is unconstitutional insofar as it attempts to impose a tax upon the franchises of foreign corporations, or at least upon their right to carry on a purely intra-state business—a matter over which the Federal Government has no control. The whole Act, therefore, must fail, inasmuch as it cannot be assumed that Congress intended to pass a law which would place State corporations at a disadvantage with respect to foreign corporations engaged in the same character of business.

(4) The tax is so unequal that by definition it is not a tax within the delegated power of congress to impose.

The argument of this brief will be centered principally upon the second of the foregoing propositions.

Nature of the Tax.

The Act of Congress provides generally that every corporation "shall be subject to pay a special excise tax with respect to the carrying on or doing business by such corporation, equivalent to 1 per centum upon the entire net income over and above $5,000 received by it from all sources during the year." Is the tax thus imposed (a), a tax upon corporate income; (b) an occupation tax; (c) a tax upon franchises as property; or (d) a tax upon the existence of corporations or partnership as-

sociations as such, or, as it is sometimes expressed, a tax upon the right to do business in a corporate or associated form?

If, following the suggestion of this court in the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 580, 583, and the even more pertinent suggestion in *Galveston, etc., Ry. Co.* v. *Texas*, 210 U.S. 217, 227 where a tax *equal* to a percentage of gross receipts was held to be a tax on gross receipts, the substance and not the letter of the statute be regarded and the tax be looked upon as a tax upon *income*, it must necessarily follow that the tax is unconstitutional because in many cases it will be found to be a tax upon the income of corporations derived from real or personal property or municipal securities or other property beyond the taxing power of Congress, and is not apportioned among the States according to population. In the particular case of the Interborough Rapid Transit Company, if the tax be a tax imposed upon its income, it is proper to point out that its income is derived almost exclusively from its special franchises, and that these franchises are expressly declared by the laws of the State of New York (Laws of 1896, chapter 908, subdivision 3, as amended by Laws of 1899, chapter 712) to be real estate.

The tax, however, in terms, purports to be "a special excise tax with respect to the carrying on or doing business" by corporations. If a tax imposed upon the deposits of a savings bank is a tax upon the franchise of the bank, as was held in *Society for Savings* v. *Coit*, 6 Wall., 594, or, if a tax upon the accounts of depositors equal to a given percentage of the amount of the deposits is likewise a franchise and not a property tax, as was held in *Provident Institution* v. *Massachusetts*, 6 Wall., 611, or if a tax upon the dividends or coupons payable by a corporation is an excise tax on

the corporation as was held in *R. R.* v. *Collector*, 100 U. S., 595, 598, it may be that a tax which by its terms, purports to be an excise tax, should be so regarded. Assuming then, without further argument of this point, that the tax in controversy is an excise tax and, therefore, need not be apportioned among the States according to population, the particular thing upon which this excise tax is imposed, remains to be considered.

In this aspect it seems certain that the tax cannot be considered an *occupation* tax, such as was the tax imposed upon "every person, firm, corporation or company carrying on or doing business of refining sugar," which was considered by this Court in *Spreckles Sugar Refining Co.* v. *McLain*, 192 U. S., 397, and held to be an excise tax "in respect of the carrying on or doing business of refining sugar." The law clearly does not impose any tax upon any business or any occupation as *such*. This follows not only from the obvious fact that no business or occupation is specified, but also from the circumstance that if any occupation or business were in fact subjected to the tax, every person engaged in that occupation or business would have to pay it, whereas under the law as it stands, only corporations and joint stock companies or associations pay the tax, and that quite irrespective of the business or occupation in which they may be engaged.

Neither does it seem possible to infer that the tax imposed by the Act of Congress is a tax upon corporate franchises as *property*. It is undoubtedly true that the courts have recognized the distinction between the sovereign franchises of a corporation, or its right to be a corporation, and the special franchises enjoyed by it which are treated as property and which may be separately taxed. *Farrington* v. *Tenn.*, 95 U. S., 679, 687; *Vcazie Bank* v. *Fenno*, 8 Wall., 533, 548. But if this be true, it is neverthe-

less manifest that corporate franchises under the Act of Congress under consideration are not taxed as property, inasmuch as, quite to the contrary, the language of the Act imposes an excise tax upon corporations with respect to their carrying on or doing business. If the tax were indeed a *direct* tax upon franchises as *property*, it would then follow that the law must be unconstitutional, particularly with respect to the corporation involved upon this appeal, because the tax is not apportioned according to population. The principal franchise enjoyed by the Interborough Company is its franchise to operate a public service rapid transit railroad under the streets of the City of New York; and this franchise, as already stated, has been expressly declared by the State of New York to be real property.

The tax, therefore, can only be an indirect tax upon the right to do business as a corporation; and such, indeed, is the tax by the definition of the statute itself.

We are thus brought to the consideration of the first point.

I.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL, INASMUCH AS IN EFFECT IT IMPOSES A TAX UPON THE RESERVED POWERS OF THE STATES TO CREATE CORPORATIONS AND ENDOW THEM WITH FRANCHISES WHICH ARE IN THEMSELVES ATTRIBUTES OF SOVEREIGNTY.

The tax in terms is a tax imposed upon corporations with respect to their carrying on or doing business; but it is obvious that it is really a tax upon the power of the State governments to *create* corporations, inasmuch as if a corporation can be taxed as such for carrying on its business as a cor-

poration, and if the power to tax involves, as has been so often stated by this Court, the power to destroy, then, necessarily, the power of States to create corporations may likewise be destroyed under the guise of a similar taxation.

For of what value would be a grant of corporate franchises to a private corporation, if the corporation in the very act of enjoying those franchises could be taxed out of existence? The argument at this point clearly falls under the principle so often asserted by this Court, and aptly stated by Justice BROWN, in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S., 601, 691, that "a tax upon an incident to a prohibited thing is a tax upon the thing itself; and if there be a total want of power to tax the thing, there is an equal want of power to tax the incident." See *Brown* v. *Maryland*, 12 Wheat., 419, holding that a license tax upon an importer was a tax upon imports; *Weston* v. *Charleston*, 2 Pet., 449, that a tax upon stock for loans to the United States was a tax upon the functions of the Government; *Dobbins* v. *Commissioners*, 16 Pet., 435, that a tax upon the salary of an office was a tax upon the office itself; *Passenger Cases*, 7 How., 283, that a tax upon alien passengers arriving in ports of the State was a tax upon commerce; *Almy* v. *California*, 24 How., 169, that a stamp tax upon bills of lading was a tax upon exports; *Crandall* v. *Nevada*, 6 Wall., 35, that a tax upon railroads and stage companies for every passenger carried out of the State was a tax on the passenger for the privilege of passing through the State; *Cook* v. *Pennsylvania*, 97 U. S., 566, that a tax upon the sale of goods was a tax upon the goods themselves; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S., 34, that a tax upon Pullman cars running between different States was a tax upon interstate commerce; *Leloup* v. *Mobile*, 127 U. S., 640, that a license tax upon

telegraph companies was a tax upon interstate commerce; and *Galveston, Harrisburg, etc., Ry. Co.* v. *Texas*, 210 U. S., 217, that a tax upon *intra*-State railroad companies handling *interstate* business *equal* to one per centum of their gross receipts, was likewise a tax upon interstate commerce.

Now, that a grant of a corporate franchise is, (a) the exercise of a sovereign faculty, and (b) that this power was not alienated by the several States to the national Government, are propositions too plain for discussion.

a. In *California* v. *Pacific R. R. Co.*, 127 U. S., 1, 40, Justice BRADLEY, speaking for this Court, inquired:

> "What is a franchise? Under the English law, Blackstone defines it as 'a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject.' (2 Bl. Com., 37.) Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls

> for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic, without legislative authority. Corporate capacity is a franchise."

b. Upon the other hand, in *Briscoe* v. *Bank of Comth. of Ky.*, 11 Peters, 257, this Court held that a State possessed the power to charter a bank, that the power was an incident to sovereignty, and that there was no limitation in the federal Constitution on its exercise by the State.

The language of the dissenting judges in *Veazie Bank* v. *Fenno*, 8 Wall., 533, 555, is likewise pertinent in this connection, inasmuch as on this point they did not express a doctrine upon which the majority was in disagreement with them. After commenting upon the effect of the decision in *Briscoe* v. *Bank of the Commonwealth of Ky.*, as stated above, they went on to say:

> "As we have seen, in the forepart of this opinion, the power to incorporate banks was not surrendered to the Federal Government, but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them. The question as to the taxation of the powers and faculties belonging to governments is not new in this Court."

The justices complained that the effect of the

main decision was not only to strike down the power to create banks, but

> "the power to create any other description of corporations, such as railroads, turnpikes, manufacturing companies, and others,"

and that the

> "taxation of the powers and faculties of the State governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority."

The main opinion in *Veazie Bank* v. *Fenno*, evaded this issue, although it conceded that when franchises were conferred for the purpose of giving effect to some reserved power of a State they were not proper objects for taxation.

If, then, the tax is essentially a tax imposed upon the full enjoyment of a sovereign prerogative, and is therefore a tax upon the exercise by the sovereign of the right to confer that prerogative; if this right is a reserved right of the several States under the Constitution; and if the Federal taxing power, though comprehensive in terms, is yet so circumscribed that it cannot be employed to destroy the exercise by the States of a sovereign function;—it necessarily follows that the law in question is unconstitutional.

A fresh light, however, will be thrown upon this subject, if we consider those cases in which it has been held that the States cannot even *indirectly* tax a corporate franchise granted by the national Government; and then turn to the consideration of the converse proposition that a fran-

chise of a State is entitled to as much protection from the Federal Government as is a franchise of the Federal Government from any one of the States.

McCulloch v. *Maryland*, 4 Wheat., 316, holding that the State of Maryland might not tax the notes of the banks of the United States, is the earliest and the greatest case which establishes the first postulate of this syllogism. But there are others—*Osborne* v. *Bank of U. S.*, 9 Wheat., 768; *Brown* v. *Maryland*, 12 Wheat., 419; *Weston* v. *The City of Charleston*, 2 Pet., 449; *Bank of Commerce* v. *New York*, 2 Black., 628; *Bank Tax Case*, 2 Wall., 200; *Owensboro National Bank* v. *Owensboro*, 173 U. S., 664; *First National Bank of Louisville* v. *Stone*, 174 U. S., 438; culminating in *California* v. *Pacific R. R. Co.*, 127 U. S., 41—perhaps even more pertinent. How firmly the doctrine has been established by this Court may be gathered from the forcible language employed by Justice BRADLEY, in delivering the opinion of the Court in the case last mentioned:

> "Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States, may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject."

This case, it should be borne in mind, was not a case involving the protection of the corporate powers of a corporation of the United States, but

the protection of a franchise—a franchise to extend its road as a connecting link of interstate commerce from California to Utah—that was bestowed upon a State corporation by an Act of Congress. The foregoing passage from Justice BRADLEY'S opinion was quoted with approval by this Court in *Central Pacific R. R. Co.* v. *California*, 162 U. S., 91, 124, where the Court concluded:

> "Thus it was reaffirmed that the property of a corporation of the United States might be taxed, though its franchises, as, for instance, its corporate capacity and its power to transact its appropriate business and charge therefor, could not be."

In view of these decisions, it would seem to be impossible to doubt the invalidity of an Act of the State of New York, which, over the objection of the Congress of the United States, might impose a tax upon a corporation organized by the United States for the purpose of building, let us say, an interstate railroad through the State of New York, with respect to "the carrying on or doing business by such corporation." See *Leloup* v. *Port of Mobile*, 127 U. S., 640, 648. Indeed, the decisions of this Court may be said to establish the proposition that, while the franchises of a corporation of the United States may never be taxed by a State government, not even the property of a corporation of the United States may be taxed if Congress should declare it to be exempt.

In *Thomson* v. *Pacific R. R.*, 9 Wall., 579, 588, Chief Justice CHASE, delivering the opinion of the Court, said:

> "We do not doubt, however, that upon the principles settled by that judgment (*McCulloch* v. *Maryland*), Congress may, in the exercise of powers incidental to the express

> powers mentioned by counsel (power to regulate commerce and establish post-offices and post-roads), make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; *and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.*"

And in *Central Pacific R. R.* v. *California*, *supra*, the Court was careful to say:

> "Of course, if Congress should think it necessary for the protection of the United States to declare such property exempt [the property of federal corporations] that would present a different question."

The right of Congress to exempt the property and operations of its own incorporations from State taxation and control by a specific declaration to that effect was likewise recognized in *Reagan* v. *Mercantile Trust Co.*, 154 U. S., 413, 415, 416.

But if a State government cannot tax the franchises or operations of a national corporation chartered to assist the National Government in the discharge of a delegated power, by what better right may the National Government tax the franchises or operations of a State corporation chartered to assist a State Government in the discharge of a reserved power?

If any rule of correlative limitations between the Government of the United States and the governments of the respective States were well established, it would seem to be this: that in the respect stated, the State and Federal Governments are

upon an equal footing. The authorities to this effect are numerous and to the point: *Collector* v. *Day*, 11 Wall., 113, 128; *R. R. Co.* v. *Peniston*, 18 Wall., 30; *Van Brocklin* v. *Tenn.*, 117 U. S., 151, 162; *The Income Tax Cases*, 157 U. S., 584; *Knowlton* v. *Moore*, 178 U. S., 41, 59; *Plummer* v. *Coler*, 178 U. S., 115, 117; *Ambrosini* v. *U. S.*, 187 U. S., 1, 7; and *South Carolina* v. *U. S.*, 199 U. S., 487. They will be considered in detail in the discussion of the succeeding point of this brief. They may be said, however, to be epitomized in the early statement of the Court in *R. R. Co.* v. *Peniston*, 18 Wall., 1, 30, that:

> "While it is true that Government [the Government of the United States] cannot exercise its powers of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to the national Government."

It would, therefore, seem to follow that under the principle of reciprocity which forbids a State Government from taxing the franchises of a Federal Corporation, or its operations, the Federal Government is equally inhibited from taxing the franchises or operations of a corporation organized under the laws of one of the several States.

II.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL WITH ESPECIAL REFERENCE TO THE INTERBOROUGH RAPID TRANSIT COMPANY, THE RESPONDENT HEREIN, INASMUCH AS IT IMPOSES A TAX UPON A PUBLIC AGENCY ENGAGED IN CARRYING ON A MUNICIPAL, AND THEREFORE, UNDER THE DECISIONS OF THIS COURT, A STATE ENTERPRISE.

The argument of the preceding point has been broad enough, if sound, to cover the case of all corporations organized under the laws of any State, in whatever business they may be engaged. It is now proposed to consider the special case of the Interborough Rapid Transit Company, and to show that, whatever the general rule, this company falls within the particular rule established by this Court, that Congress has not the power to tax the franchise of a State corporation expressly created for the purpose of carrying on a public work, and expressly exempted from taxation with respect to its franchises and such portion of its property as may be engaged therein.

If, as has been held by numerous decisions of this Court, a railroad chartered by the Congress of the United States, employed to transport the mails of the United States, or its troops and munitions of war, and engaged in conducting broadly an interstate commercial business, notwithstanding the fact that its existence is due to private initiation, and its profits are distributed to private investors, is nevertheless an agency of the Federal Government, so that its right to exist and carry on its work cannot be taxed by any State government—upon what ground can it be justly claimed that the corporation involved in this appeal—the Interborough Rapid Transit Company—is not likewise a governmental

agency engaged in carrying on a public enterprise for the City of New York? It has long since been established by the decisions of this Court that a municipality is but the arm of a State government, that a municipal undertaking is a public undertaking of the State, and that, therefore, municipal property and municipal agencies enjoy the same protection from Federal taxation as the property and agencies of the State itself. If any authority were needed to show that the Interborough Rapid Transit Company is a public agency in the broadest sense, in a sense equally as broad as that in which the Pacific Railroad companies for example have been asserted to be Federal agencies—it will be found in the Acts of the Legislature of the State of New York, which authorized it to be incorporated for the express purpose of bringing to the great metropolis of that State the sorely needed relief of rapid transit; and in the further provisions of the law, exempting from taxation, not only its personal property employed in the operation of the subways, its machinery, rolling stock and equipment, but also its contract interest in the road itself. This exemption from taxation and the public character of this company have stood the test of the courts of the State of New York. In *People ex rel. Interborough R. T. Co. v. Tax Commissioners*, 126 App. Div., 610, affirmed without opinion by the Court of Appeals of New York, there was involved the right of the Interborough Company to be exempt with respect to its special franchise to operate a railroad under the streets of New York City. The language of the Appellate Division in that opinion fully states the Company's case:

> "A special franchise of a railroad is its right to construct, maintain and operate a railroad in public streets, highways or pub-

lic places. (*People, ex rel., Met. St. R. Co. v. Tax Comrs.*, 174 N. Y., 417, 435, 436.) By the Rapid Transit Law and the Acts amendatory and supplemental thereto, the special franchise as well as the road itself is the property of the City, and is merged in and became a part of the public highway for the public use.

* * * * *

"The City itself was not given the power of a railroad corporation, and, was, therefore, incapable, except through the contract which the statute authorized, of making this public work available for public use. For the purposes of this case it is unnecessary to determine whether the relator is technically a lessee, an operator or a separate contractor who performs a public service which the City could perform only through the agency of another, and the performance of which it was its duty to provide. However the matter is viewed, we find a public highway, operated in the manner required by the statute and the commission in charge of it, the operator paying a fixed sum to the City for the use of the property and the balance of the fares are held by it for performing the public service.

* * * * *

"If the City had been given power to operate this road, it is clear that no franchise tax could be charged against it. As the City can only operate it through another, it would seem to follow that the operator for the City is also exempt from taxation. The general scheme of the statute under which this subway was built was: The City bonded itself to pay for the construction of the road, which bonds, with interest thereon, are to be paid by the operation of the road, so that at the end of the lease or contract for operation, the City will own the road free of cost. It was, therefore, necessary, in order to make the scheme available, to find a contractor who would agree to construct, maintain and op-

> erate the road upon terms which the statute permitted the City to make. A statute declaring the property of a municipality free from taxation, which property it can only use through the services of a special contractor or lessee, confers no benefit upon the City if the contractor or lessee is to be taxed for using the property, as the amount of the tax would necessarily affect the rental which the City may receive. The statutory exception, therefore, is meaningless, unless it exempts the property from taxation when applied to the only use and in the only manner in which the City could use it."

We, therefore, have in the present case not only an appropriate agency of the State for the purpose of carrying on a public enterprise, but an indispensable agency; for the municipality, as stated by the Appellate Division, had not the authority to operate the road itself, and the Rapid Transit Act of the State of New York provided that it could be operated only by a corporation organized under that Act.

Nor is the exemption from taxation important only as showing the public character of the Interborough Company. It is likewise important as an inhibition. If it be true, as stated in the cases cited under the foregoing point, that even the property owned in a private capacity by a corporation organized by the Government of the United States and engaged in a national undertaking cannot be taxed by a State, if the Federal Government should so declare, the statement is justified by the parity of reasoning which pervades the consideration of this whole question, wherever the correlative rights of the State and Federal governments are involved, that the solemn declaration of the State of New York that this corporation should not be taxed, withdraws it from the category of subjects upon

which the Federal Government may justly impose an excise tax, even if that right otherwise existed.

The public character of this Company having been thus defined by the legislature and the courts of New York, and being apparent from the nature of the Company, it is proper to now pass in review the cases in which the general principle has been asserted by this Court that the public agencies of a State, or of a municipality of a State, may not be taxed by the Federal Government.

In *Veazie Bank* v. *Fenno*, 8 Wall, 533, 547, where the Supreme Court sustained a tax of 10 per centum upon the notes of State banks issued for circulation, upon the ground that the tax was a property tax, the Court nevertheless safeguarded the rights of the State in a situation, whereof the present case is a concrete example, by saying:

> "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress."

In *The Collector* v. *Day*, 11 Wall., 113, 125, it was held that the salary of a state judge was exempt from national taxation. The Court said:

> "It would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which

> power acknowledges no limits, but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *United States* v. *Railroad Company*, 17 Wall., 322, was involved the right of the Federal Government to impose a tax on money due from the Baltimore & Ohio Railroad Company to the City of Baltimore. It was held that the City was a part of the State in the exercise of a limited portion of the State's powers and that the tax could not be sustained. The Court said (p. 327):

> "The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization * * *

To the same effect was *United States* v. *Louisville*, 169 U. S., 249.

In *Mercantile Bank* v. *New York*, 121 U. S., 138, 162, it was held that the United States could not tax the bonds issued by a State, or under its authority, and held by private corporations.

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 584, the only point upon which the entire court concurred, was upon the lack of authority to include as taxable income the income derived from interest on municipal bonds.

The foregoing cases on principle seem to be in point; but on the facts it may be admitted they are not so applicable to the situation of the Interborough Company as are those cases in which it has been held that a privately owned bank, organized under the laws of the United States by virtue of its power to regulate the currency, or a privately owned railroad company, chartered by Congress in the exercise of its power to regulate commerce between the States, is such an agency of the Government, that neither its franchises, its operations, nor, if so declared by Congress, its separately owned property, may be taxed by a State government.

These cases have already been partly cited in detail. Their general doctrine may be said to be aptly summarized by Chief Justice CHASE in *Van Allen* v. *The Assessors*, 3 Wall., 573, 591:

> "That Congress may constitutionally organize or constitute agencies for carrying into effect the national powers granted by the Constitution; that these agencies may be organized by the voluntary association of individuals, sanctioned by Congress; that Congress may give to such agencies, so organized, corporate unity, permanence, and efficiency; and that such agencies in their being, capital, franchises, and operations, are not subject to the taxing power of the States, have ever been regarded, since those decisions, as settled doctrines of this Court."

So, likewise, in *Railroad Co.* v. *Penniston*, 18 Wall., 1, 36, the Court, while recognizing, in the absence of a declaration by Congress to the contrary, the rights of States to tax the property of a Federal corporation, disclaimed the right of a State under any circumstance to impose a tax upon "the franchise or the right of the company to exist and perform the functions for which it was brought

into being"; and Justice BRADLEY, in his dissenting opinion, observed in this connection (p. 46):

> "Now, I think it cannot be doubted at the present day, whatever may have been contended in former times, that the creation of national roads and other means of communication between the States, is within the power of Congress in carrying out the powers of regulating commerce between the States, establishing post-offices and post-roads, and in providing for the national defense and for military operations in time of war. And no one will contend that, if the creation of a corporation is a suitable agency and means of carrying on the financial operations of the government, the creation of a corporation is equally apposite as an agency and means of carrying out the objects above mentioned."

And in *Luxton* v. *North River Bridge Co.*, 153 U. S., 525, 529, Justice GRAY, delivering the opinion of the Court, said:

> "The Congress of the United States, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end.
>
> * * * * * *
>
> "Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States."

See also *U. S.* v. *Union Pacific R. R. Co.*, 91 U. S., 92, and *U. S.* v. *Stanford*, 161 U. S., 412.

Indeed, the analogies to be drawn from the de-

cisions on Federal franchises so completely cover the case of the Interborough Company that it becomes important to inquire more minutely than heretofore to what extent the rule of reciprocity as to the mutual exception of the governmental agencies of the one government from taxation by the other has been established by the decisions of this Court. That a complete reciprocity does exist, notwithstanding an earlier dictum to the contrary, we think may now be said to be firmly settled by the force of the following authorities:

In *Collector* v. *Day*, *supra*, the whole decision was rested upon the application to the States of the converse of the proposition settled in *McCulloch* v. *Maryland*, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." Having first adverted to the dual system of State and Federal government under our Constitution the Court proceeded to say:

> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments * * * should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax." * * *
>
> "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preserva-

> tion, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution which prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentality of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The scope of this decision and the pertinency of the principle to the exact issue presented on this appeal may be gathered from the dissent of Justice BRADLEY, wherein he queries—

> "Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation?"

The reciprocity rule was next asserted in the case of *Railroad* v. *Penniston*, 18 Wall., 30, as follows:

> "While it is true that government (meaning the government of the United States)

> cannot exercise its powers of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government."

In *Van Brocklin & Another* v. *State of Tennessee & Others*, 117 U. S., 151, 162, the Supreme Court quoted with approval the statement of the reciprocity rule in *Fagan* v. *Chicago*, 84 Illinois, 227, 233, 234, as follows:

> "Nor under our system of government can the State tax the general government, its agents or property, nor can the general government tax the States, their agents or property."

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 584, the rule was stated thus:

> "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

In *Plummer* v. *Coler*, 178 U. S., 115, 117, the Court reaffirmed the doctrine by reference to the foregoing authorities, and declared:

> "The reasoning upon which the two lines of decision proceed is the same."

In *Knowlton* v. *Moore*, 178 U. S., 41, 59, the doctrine of reciprocity was recognized in the following language:

> "This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the National government or the instrumentalities employed to carry such powers into execution, and, conversely, that the same limitation rests upon the National government in relation to the powers of the several States."

In *Ambrosini* v. *United States*, 187 U. S., 1, 7, it was held that good behavior bonds required to be given by liquor dealers to the City of Chicago, were exempt from the stamp tax imposed during the Spanish-American War. The Court said:

> "The general principle is that the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the Federal Government. It rests on the law of self-preservation, for any government, whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government, exists only at the mercy of the latter."

Even in the case of *South Carolina* v. *United States*, 199 U. S., 452, 453, 454, a case to which more extended reference will hereafter be made, it was fully recognized that:

> "the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers."

and that

> "Each State is subject only to the limitations prescribed by the Constitution and

> within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that 'the United States shall guarantee to every state in this Union a republican form of government.' Art. 4, sec. 4. That expresses the full limit of National control over the internal affairs of a State."

It does not seem possible that the case of *South Carolina* v. *United States*, *ubi supra*, was intended to establish an opposite rule or that in view of the many decisions already cited to the contrary, it can be cited as an authority for the proposition, that the particular corporation involved in the case under discussion, to wit, the Interborough Rapid Transit Company, cannot properly be looked upon as an instrument employed by the State, "in the discharge of its ordinary functions as a government." It is true that in that opinion, although against strong dissent, it was stated that the decisions already referred to seemed to indicate that the thought had been that the exemption of State agencies and instrumentalities of National governments was limited to those of a strictly governmental character, and did not extend to those which were used by the State in carrying on an ordinary private business. But, assuming the correctness of this conclusion when applied to the case where the State or municipality engages in a private business primarily and principally for the sake of profit, it certainly has no application, unless the force of all the decisions heretofore adverted to be waived aside, to the case where the State or municipality derives no direct profit from a special enterprise and where the enterprise itself is carried forward in order to promote an important public undertaking properly falling within the domain of the State's powers of internal regulation. The analogy so often referred to between the Pacific railroads and the subways

of New York City is complete. In the case of Pacific railroads the actual profits from operation, as here, went chiefly to the corporations expressly chartered to carry on their operation, but so essential were they thought to be to the discharge of the general obligation assumed by the National government to foster and promote intercourse between the States, that the point was never seriously urged that they were not appropriate instrumentalities of National government to the accomplishment of that end. It is now too late to insist that a railroad built by a great City, owned by that City, and affording an absolutely indispensable facility for the daily intercourse of its citizens, is not likewise within the narrower limits of the internal affairs of State or City, which is an arm of the State, an appropriate agency of the State government. It would seem as though the case of *United States* v. *Railroad Company*, 17 Wall., 322-330, were conclusive upon this head.

The City of Baltimore had subscribed to the bonds of the Baltimore & Ohio Railroad Company, and it was held that these bonds were beyond the power of the Federal Government to tax. Referring to the public character of this investment, this Court said:

> "That the State possessed the power to confer this authority upon the City, we see no reason to doubt.
>
> "Was it exercised for the benefit of the municipality, that is in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power? The legislature and the authorities of the City of

> Baltimore decided that the investment of $5,000,000 in aid of the construction of a railroad, which should bring to that City the unbounded harvests of the west, would be a measure for the benefit of the inhabitants of Baltimore and of the municipality. This vast business was a prize for which the States north of Maryland were contending. Should it endeavor by the expenditure of this money or this credit to bring this vast business into its own State, and make its commercial metropolis great and prosperous, or should it refuse to incur hazard, allow other States to absorb this commerce, and Baltimore to fall into an inferior position? This was a question for the decision of the City under the authority of the State. It was a question to be decided solely with reference to public and municipal interests. The City had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The State could do these things by the direct act of its legislature, or it could empower the City to do them. It could act directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result to the benefit of the City. It might be wise, or it might prove otherwise. The City was to reap the fruits in the advanced prosperity of all its material interests, if successful. If unsuccessful, the City was to bear the load of debt and taxation, which would surely follow. The City had the power given it by the legislature to decide the question. It was within the scope of its municipal powers."

The authority of this case was crystallized into legislation by the Act of Congress of February 25, 1893 (27 Stats, 477), directing a refund to the City of Louisville of the Federal tax imposed under the Internal Revenue Act of 1864, upon the stock of

the Louisville and Nashville R. R. Co. owned by the City. See *United States* v. *Louisville*, 169 U. S., 249.

Much other authority upon this point could be cited, but the power of subdivisions of a State Government, either counties, townships, or municipalities, to subsidize works of internal improvement, and, most of all, public improvements which facilitate the intercourse of citizens with each other, has long been an established principle of our polity. Had the principle not been early established and fully recognized, the vast development of this land and its political units could never have been assured, or must at least have been indefinitely postponed.

And this suggestion leads to another important aspect in which the South Carolina Dispensary case may be distinguished from the case at the bar. It was there held that the Constitution should be interpreted in the light of the circumstances surrounding its framers, and it was suggested that when the Constitution was adopted, "there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plan of a body politic to take up the work of the individual or body corporate." It was therefore argued that when the framers of the Constitution conferred upon the National government the power to impose license taxes, they could not have supposed that the State governments by extending their functions to ordinary commercial operations would limit or destroy this power; but this argument can scarcely be applied with respect to the ordinary routes of communication which from time immemorial have always been looked upon as proper objects of public ownership and of public control. At the time the Constitution was adopted, the nearest approach to the railroads of

today were the public roads of that era, and these were universally under the control of the State Governments or subdivisions of the State Governments. Canals and post-roads were already under governmental protection the world over, and although the power to establish post-roads was committed to Congress, there can scarcely be a doubt that the States recognized as well as retained their rights to improve the avenues of internal communication. It cannot, therefore, be said that when the Constitution was adopted its framers did not contemplate that the power of the State might be extended to the creation of improved facilities for travel and communication, and, indeed, the Constitution was scarcely in existence when, prior to the beginning of the railroads, an extensive system of artificial water communication was put into force chiefly through the aid or by the direct appropriations of the State Governments. New York was one of the first to exercise in this respect its governmental functions, and the Erie Canal was formally proposed as a State undertaking in the year 1791.

But probably the most obvious distinction between the South Carolina case and that of the Interborough Company is to be found in an application of the rule, well established by this Court, that if a thing itself cannot be taxed, neither can an incident essential to the enjoyment of the thing be taxed. The liquor business, of course, has always been subject to taxation, and, therefore, the right to carry on that business must be subject to taxation as well, even though it be carried on by a sovereign State itself; as otherwise, as Justice WHITE observed in commenting upon the *South Carolina* Case, in *Murray* v. *Wilson Distilling Co.*, 213 U. S., 151, 173, a State might "destroy a pre-existing right of taxation possessed by the Government of the United States." But a railroad owned by the

City of New York is not subject to taxation, nor in consequence can a corporation, expressly created to operate it and without which it could not be operated at all, be subjected to taxation when the State has declared to the contrary; for otherwise, to paraphrase the language of the Court in *Railroad Co.* v. *Penniston*, 18 Wall., 5, 36, the company would be "deprived of its power to serve the government as it was intended to serve it, and hindered in the efficient exercise of its power."

It is now proper to advert to the distinction made by Mr. Justice BRADLEY, in his dissenting opinion in *Railroad Company* v. *Penniston*, 18 Wall., 48, relying upon an observation made by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*, 4 Wheat., 405. Justice BRADLEY in endeavoring to establish the proposition against the views of a majority of the court that not only the franchises of the Union Pacific R. R. Co., a National corporation, were exempt from State taxation, but the property owned by that corporation as well, was naturally led to consider the opposing argument that if the property as well as the franchises of a Federal corporation were exempt from State taxation, the property as well as the franchises of a State corporation should likewise be exempt from Federal taxation. He stated this question as follows:

> "But, it may be asked, if the States cannot tax a United States corporation created for public and national purposes, on what principle can the General government tax local corporations created by the State governments for local and State purposes? If the States cannot tax a National bank, how can the United States tax a State bank? The answer is very manifest, and is stated by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*."

The learned Justice then proceeded to quote several extracts from *McCulloch* v. *Maryland*, of which the following was the most important:

> "It has also been insisted that, as the power of taxation in the General and State governments is acknowledged to be concurrent, every argument which would sustain the right of the General government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the General government. But the two cases are not on the same reason. The people of all the States have created the General government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

Manifestly the language employed by Chief Justice MARSHALL was unnecessary to the decision of the case before the Court. In answer to it, it can only be said that this dangerous dictum, notwithstanding the elevated source from which it proceeded, has never been applied as a principle of any de-

cision rendered by this tribunal. Indeed, the long line of cases beginning with *Collector* v. *Day*, 11 Wall., 113, 125, summarized above, are a direct negation of this doctrine.

The third and fourth propositions set forth in the beginning of this brief may be briefly stated.

III.

THE ACT OF CONGRESS IS UNCONSTITUTIONAL IN SO FAR AS IT ATTEMPTS TO IMPOSE A TAX UPON THE FRANCHISES OF FOREIGN CORPORATIONS, OR AT LEAST UPON THEIR RIGHT TO CARRY ON A PURELY INTRASTATE BUSINESS—A MATTER OVER WHICH THE FEDERAL GOVERNMENT HAS NO CONTROL. THE WHOLE ACT, THEREFORE, MUST FAIL, INASMUCH AS IT CANNOT BE ASSUMED THAT CONGRESS INTENDED TO PASS A LAW WHICH WOULD PLACE STATE CORPORATIONS AT A DISADVANTAGE WITH RESPECT TO FOREIGN CORPORATIONS ENGAGED IN THE SAME CHARACTER OF BUSINESS.

The Act of Congress of August 5, 1909, imposes a tax not only upon corporations of the United States or any State or Territory thereof, but also a special excise tax with respect to the carrying on and doing business of any corporation organized under the laws of any foreign country.

It is a proposition too plain for comment that no state can subject a non-resident to its sovereignty. It certainly is beyond the power of the Federal government to tax the franchises, for example, of a corporation of Great Britain. If the tax upon foreign corporations, therefore, is to be sustained, it must be upon the theory that the National government has authority to license foreign corporations to do business within the geographical limits of a State of the union. Indeed, the tax in terms pur-

ports to be a tax upon the right of a foreign corporation to carry on or do business within the United States, or any State or Territory thereof. If this right can be sustained, then it clearly falls within the power of the Federal government to prohibit by taxation a foreign corporation from transacting a wholly domestic business within the limits of any State of the United States. It can, for example, impose a tax upon the admission of a foreign Insurance Company to underwrite risks in the State of New York, and it can thus withdraw from the State the right to regulate its own internal commerce, a right which from the earliest days of the Republic has been universally conceded to lie within the sole jurisdiction and regulation of the several States. The authority of Congress to tax under any appropriate form an established business or occupation within its jurisdiction may be conceded; but it does not seem possible that any successful contention can be made that will uphold the authority of the United States to tax either the franchises of foreign companies as such or their primary right to carry on business of an exclusively domestic character within any given State. "The power to authorize a business within a state is plainly repugnant to the exclusive power of the State over the same subject." *License Tax Cases*, 5 Wall., 462, 471. See also *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S., 204, 210. The law, therefore, insofar as it applies to such companies, would seem to be unquestionably a law not lying within the delegated powers of the Federal government to enact.

But if that be true, the whole law would likewise seem to fail upon the principle sustained in the *Income Tax* cases, that where certain important sections of a law, constituting an entire scheme of taxation, are necessarily invalid, the whole law

must fall, because it cannot be assumed that the Legislature would pass the residuum independently of the parts which are held to be unconstitutional. There is a special force in the application of this principle to the law in question, provided the tax upon foreign corporations cannot be enforced, as, otherwise, all foreign corporations doing business within the confines of any State in the Union would have a distinct preference over domestic corporations, to wit, an exemption from taxation which domestic corporations could not enjoy. It certainly could not be assumed that Congress could have intended to produce any such result as this, or, that with any such situation before it, it would have enacted any part of the present scheme imposing a special franchise tax upon corporations.

IV.

THE TAX IS SO UNEQUAL THAT BY DEFINITION IT IS NOT A TAX WITHIN THE DELEGATED POWER OF CONGRESS TO IMPOSE.

It is true that the provision of Article I, Section 8, of the Constitution, that excise taxes must be uniform throughout the United States, has been held by this Court to mean a geographical uniformity. It is not, therefore, upon this section that the proposition is rested that the present law is unconstitutional, because unequal. The primary power delegated to the Federal government to impose taxes, carries with it the necessary implication that those taxes should be substantially uniform and equal, or, if unequal in part, that the inequality should be based upon some rational and clearly understood principle. It might be that the exemption of one particular corporation from taxation where another

is taxed may stand upon a rational basis. It may be that the exemption from taxation of corporations enjoying a net income of less than $5,000 a year is a rational exemption, inasmuch as it might be assumed that such weaker corporations should be fostered and encouraged; but the inequalities in the present law far transcend the principle of a rational inequality, and where they do not transcend that principle, clearly invade the jurisdiction reserved to the several States.

To illustrate: The present company does not enjoy the right, with other corporations, in arriving at the amount of tax it will have to pay to deduct the interest upon its bonded debt in excess of its capital stock. The only rational ground upon which this discrimination against corporations whose fixed indebtedness exceeds their capital stock can be rested, must be the ground that in the furtherance of a wise public policy it is advisable to restrict the indebtedness of corporations to an amount which shall not exceed their capital stock. This principle, indeed, has been made effective by recent legislation in several States; but the power thus exercised is a power which exclusively lies within the province of the States to exert, for it is elementary that the regulation of domestic corporations is not confided to the national legislature. *Central Pacific Railroad* v. *California*, 162 U. S., 91, 122.

Again only corporations engaged in a certain character of business are taxed. Labor, agricultural and horticultural organizations, fraternal and benevolent societies and domestic building and loan associations, are exempted from the operation of the law. If these exemptions are justified it would likewise be possible for the Federal government to exempt from the operation of the law any other class of corporations. Railroad corporations, for

example, might be either exempted or included, and insurance companies *vice versa* might be either included or exempted. Indeed, it would be possible for the Federal government to impose the corporation tax solely upon public service corporations such as the Interborough Rapid Transit Company, exempting from its operations, corporations of all other classes. In seeking, however, a concrete illustration of the inequality of this law none better indeed is to be found than that broad inequality frankly recognized by the law itself, which taxes the artificial entity known as a corporation when engaged in an industry or a partnership, when organized in the form of a partnership association, and exonerates from taxation all other character of partnerships and all individuals engaged in the same business. It ought not to be doubted that an Act of Congress which imposed a tax upon dark haired persons and exempted from taxation persons of light complexion, would be beyond the powers conferred upon Congress to impose a tax; but if this proposition be true, it can hardly be seen how the power resides in Congress to impose upon corporations alone a tax so unequal in its bearing upon the business life and industry of the country as is the tax now before the Court. This is not reasonable classification; it is mere "arbitrary selection." *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150, 159; *Southern Railway Co.* v. *Greene*, 216 U. S., 400, 417.

Conclusion.

In concluding the argument of this case, the writer ventures to recall this Court's own characterization of the equal balance it has ever maintained in adjusting the delicate relations existing

between State and National governments, with respect to their independent sovereign powers. In the *Slaughterhouse Cases*, 16 Wall., 36, 82, this Court closed as follows:

> "Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government,
> * * *
>
> "But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this Court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."

Respectfully submitted,

RICHARD REID ROGERS,
of Counsel for Appellants.

Office Supreme Court, U. S.
FILED.
MAR 16 1910
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1909.

No. ~~700~~ 442

ARTHUR LYMAN AND ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, deceased, APPELLANTS.

vs.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the Southern District of New York.

STATEMENT FOR APPELLEES.

JAMES L. QUACKENBUSH,
Counsel for the Appellees.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GEORGE BATY BLAKE, DECEASED,
APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, ET AL.,
APPELLEES.

Statement for Appellees.

The appeal herein is in an action which was brought by the appellants, who are stockholders in the defendant company to enjoin the Interborough Rapid Transit Company and its directors, the individual defendants herein, from voluntarily making the returns to the Collector of Internal Revenue required by Section 38 of the Act of Congress, entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, known as the Corporation Tax Law, on the ground that the portion of said Act which purports to provide for a special excise tax upon all corporations is repugnant to the Constitution of the United States. The action was commenced in the Circuit Court of the United States for the Southern District of New York, after the appellants had made formal demand upon the directors of the defendant company to take such steps as might be necessary

and proper to test the constitutionality of the Act hereinbefore referred to, and so protect the rights of individual stockholders by preventing a reduction of the company's income and the amount of such income applicable to dividends. The request of the appellants was fully considered by the directors of the defendant company, who, without committing themselves on the question of the constitutionality of the Act above referred to, decided that by reason of the penalties to which the company would become liable for failure to make the return and otherwise comply with the requirements of the Act, it would be inexpedient to take the course requested by the appellants, and accordingly a formal resolution to that effect was adopted.

In the court below a general demurrer was filed on behalf of the defendants and thereafter a decree was entered dismissing the bill, sustaining the demurrer and allowing an appeal direct to this Court.

Inasmuch as the Federal Government has intervened in this appeal, and in similar appeals now before this Court, by the Attorney General and the Solicitor General, who will defend the constitutionality of the said Act, counsel for the appellees herein submit only this brief statement in explanation of the position of the defendant company and its directors.

Respectfully submitted,

JAMES L. QUACKENBUSH,
Counsel for Appellees.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 827

GEORGE WENDELL PHILLIPS, APPELLANT,

vs.

FIFTY ASSOCIATES ET AL.

APPEAL FROM THE SUPREME COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED FEBRUARY 24, 1941.

(29,464)

(22,023)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 797.

GEORGE WENDELL PHILLIPS, APPELLANT,

vs.

FIFTY ASSOCIATES ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 16, 1910.

Transcript of Record of Circuit Court.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday of October, being the nineteenth day of October, in the year of our Lord one thousand nine hundred and nine.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 682, Equity Docket.

GEORGE WENDELL PHILLIPS, Complainant,
v.
FIFTY ASSOCIATES et al., Defendants.

The Bill of Complaint in this cause is filed in the clerk's office on the eighth day of February, A. D. 1910, and is duly entered at the present October Term of this Court, A. D. 1909, and is in the words and figures following:

2 *Bill of Complaint.*

(Filed Feb. 8, 1910.)

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

George Wendell Phillips, of Reno, in the State of Nevada, brings this, his bill of complaint, against the Fifty Associates, a corporation, organized and existing under the laws of the State of Massachusetts, and having its principal office and place of business in Boston, in that State, a citizen of the State of Massachusetts; Charles W. Amory, of said Boston, a citizen of the State of Massachusetts; Charles E. Cotting, of said Boston, a citizen of the State of Massachusetts; Charles F. Adams, 2nd, of Concord, a citizen of the State of Massachusetts; Francis I. Amory, of said Boston, a citizen of the State of Massachusetts; Philip Dexter, of said Boston, a citizen of the State of Massachusetts; and Francis C. Welch, of said Boston, a citizen of the State of Massachusetts.

Your orator complains and says:

(1) That he is a citizen of the State of Nevada and a resident of Reno, in said State, and brings this, his bill of complaint, in behalf of himself and all other shareholders who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit against the Fifty Associates.

3 (2) That the defendant, Fifty Associates, is a corporation, duly organized and existing under the laws of the State of

Massachusetts, and has its principal office and place of business in the City of Boston, in said State, and is an inhabitant of the District of Massachusetts; that the defendant, Fifty Associates, is managed and controlled by a Board of five (5) Directors, and that its principal executive officers are a President, Clerk and Treasurer, exercising the usual powers and subject to the usual duties and obligations attached to such offices.

(3) That the defendant, Charles W. Amory, is a citizen of the State of Massachusetts and a resident of Boston, within that State and within the District of Massachusetts, and is President and a Director of the defendant, Fifty Associates; that the defendant Charles E. Cotting, is a citizen of the State of Massachusetts and a resident of Boston, within that State and within the District of Massachusetts, and is Treasurer and Clerk of the defendant, Fifty Associates; that the defendant, Charles F. Adams, 2nd, is a citizen of the State of Massachusetts and a resident of Concord, within that State and within the District of Massachusetts, and is a Director of the defendant, Fifty Associates; that the defendants,
4 Francis I. Amory, Philip Dexter and Francis C. Welch, are respectively citizens of the State of Massachusetts, residents of Boston, within that State and within the District of Massachusetts, and are Directors of the defendant, Fifty Associates.

(4) That this suit is one of a civil nature, cognizable in equity; that the suit arises under the Constitution of the United States and under the laws thereof; that the suit is a controversy between citizens of different States and the matter in dispute exceeds, exclusive of interest and costs, a sum or value of $2000.00; and that the suit arises under the Internal Revenue Laws of the United States.

(5) That the complainant is, and, for more than a year prior to December 31, 1909, was, the owner of one of the shares of the defendant, Fifty Associates; that he, prior to the bringing of this suit, duly requested the defendant, Fifty Associates, and its Directors and Officers, to omit and refuse voluntarily to prepare and file the return hereinafter mentioned, and to refrain from paying the tax hereinafter mentioned, and to contest the constitutionality and applicability of the Act of Congress hereinafter mentioned, purporting to require the defendant, Fifty Associates, to make and file said return and to pay said tax assessed, if any; a copy of said request is hereto annexed and marked "Exhibit A;" thereupon the defendant, Fifty Associates, and its Board of Directors refused to comply with said request and further determined to instruct—and did instruct—the executive officers of said corporation to make and file said return and voluntarily to pay said tax, if any were assessed; a copy of the refusal of the defendant corporation to comply with the complainant's request is hereto annexed and marked "Exhibit B;" and the complainant says that this suit is not a collusive one to con-
5 fer on a Court of the United States the jurisdiction of a case over which it would not otherwise have cognizance.

(6) That the defendant, Fifty Associates, was incorporated by special Act of the Legislature of the Commonwealth of Massachusetts, approved February 21, 1820, under the corporate name of "The Proprietors of Museum Hall"; that said special charter was amended

by special Act of the Legislature of said Commonwealth, approved June 12, 1823, changing the name of said corporation to "Fifty Associates", and granting it generally, among other powers, the following:

"The said corporation is hereby declared and made capable to have, hold and possess real, leasehold or other estate without and beyond their present described limits, with full power to build, improve, alter, pull down and rebuild, and to manage, exchange and dispose of the same, according to the general powers heretofore granted to said corporation."

That the original charter of said Company authorized it to hold a certain parcel of real estate described in said Act, and, without providing that the Company should have a definite capital stock, enacted:

"That the corporate property shall be divided into shares not exceeding six hundred in number, as the said corporation may find to be most expedient; and the said shares shall be divided among the several proprietors, according to the interest and portions which they may respectively have in said corporate property."

That the amendment of said charter, hereinbefore referred to, provided:

"That the said corporation may at any time when they deem it expedient increase their present number of shares by a number not exceeding four hundred and that said four hundred shares shall be held as the common property of the corporation, until they shall be either divided among the said fifty associates pro rata, according to the number of shares which said associates may at any time possess, or sold, or otherwise disposed of, in such manner as said associates may hereafter determine."

6 That the original charter of said Company was granted to it by the State of Massachusetts without any reservation to the State of the right or power to amend, alter or repeal the same, and, for that reason, your orator alleges, on information and belief, that the said charter and franchise of the defendant, Fifty Associates, is a contract right, granted to it by the State of Massachusetts.

That the share of the complainant is one of the one thousand shares into which the corporate property of said corporation is divided; that said share is without a par value, but the same has a market value of something in excess of $4,000.00, and that the total valuation of the real estate of said defendant, Fifty Associates, as assessed by the City of Boston, is in excess of the total market value of its shares.

That the property of said corporation consists wholly of real estate or interest therein or leaseholds thereof, except such amounts of income as may from time to time have been set apart as surplus or reserved for working capital or such income as may have been accumulated but not declared in dividends.

That the business of said corporation, so far as it may be called a business, is the holding and managing of the property aforesaid, and such business is transacted and conducted wholly within the City of Boston, in said Commonwealth, and the income of said cor-

poration, except as the same may be derived from accumulated profits, is exclusively derived from real estate; and that, although empowered by its charter to buy and sell real estate and build, pull down and rebuild the same as a business, the said corporation is not engaged in the doing of the same as a business for profit nor is it so engaged at all, except in so far as the doing of the same may be an incident to the management of its property or the investment
7 of its funds.

(7) That, under the laws of the Commonwealth of Massachusetts, three or more persons, by compliance with the provisions of a general law, may organize a corporation for any lawful purpose, except to buy or sell real estate; and your orator avers, on information and belief, that the laws of Massachusetts have never permitted the organization of corporations under a general law for the purpose of buying and selling real estate, but on, the contrary, have always limited the grant of corporate franchises for that purpose to special Acts of the Legislature; and that during the last twenty years not more than six corporations have been specially chartered by the Legislature to do a real estate business within the City of Boston; that, under the general law governing business corporations, such corporations have power only:

"To hold, purchase, convey, mortgage or lease within or without this Commonwealth such real or personal property as the purposes of the corporation may require."

that the right and franchise of the defendant, Fifty Associates, to buy, hold and sell real estate is a special franchise belonging to the defendant corporation, granted by special Act of the Legislature of Massachusetts; that there are comparatively few corporations in Massachusetts holding such special franchises or rights and that the same are now difficult to obtain; the principal business of the corporation under its charter is to acquire, hold, manage, lease, exchange and sell real estate in the City of Boston, and, as hereinbefore stated, its entire income is substantially rents, derived directly from such real estate.

(8) That the business of holding, managing and leasing real estate in large parcels in the City of Boston in competition
8 with the defendant, Fifty Associates, and other like real estate corporations is largely conducted and carried on by so-called real estate trusts; such real estate trusts result generally from a conveyance of real estate to certain individuals as joint tenants, who thereupon execute a declaration of trust which declares a trust in favor of the holders from time to time of certain certificates for shares issued under said declaration by the Trustees; the declaration of trust defines and carefully limits the powers of the trustees in dealing with the trust property and it is usual for such deeds to provide that the trustees shall have no power to bind the shareholders personally and that no person dealing with the trustees shall have any claim or enforce any liability against the property of any trustee or any shareholder in their individual capacity, but all such claims and liabilities shall be enforced only against the trust estate.

Your orator alleges, on information and belief, that real estate ssessed at more than $75,000,000.00 is held in the City of Boston ; such real estate trusts; that their shares are quoted publicly from me to time in financial papers, and, although not traded in on e exchanges, find a ready and open market in the City of Boston; at they are traded in in substantially the same way and the cer- ficates and shares are transferred in substantially the same way as ares of the defendant, Fifty Associates, and other corporations hich are not listed on the stock exchanges.

Your orator further alleges that, under this form of trust agree- ent, a large business in holding, managing and leasing real estate competition with the defendant, Fifty Associates, and other simi- r corporations is carried on in the City of Boston, and, as your rator is informed and believes, with limited liability on the part of the shareholders of said trusts; the said trusts are not cre- ated or authorized by any general or special law or Statute of the Commonwealth of Massachusetts.

(9) That the net income or proceeds of the defendant corpora- ion for the year ending December 31, 1909, is largely in excess of he sum of $5,000.00, after deducting from the gross amount of its ncome all expenses, charges, losses not compensated by insurance, easonable allowances for depreciation, interest and taxes paid out of, r allowed against, such income during said year, and does not in- clude amounts, if any, received by it within the year as dividends pon stock of other corporations, joint stock companies or associations r insurance companies; that the said defendant corporation is not a labor, agricultural or horticultural, or fraternal beneficiary society or association, nor a building and loan association, nor is it organ- ized and operated exclusively for religious, charitable or educational purposes.

(10) That a majority of the said Board of Directors claims and asserts that the said defendant, Fifty Associates, is subject to the pro- visions of an Act of Congress of the United States, entitled:—"An Act to Provide Revenue, Equalize Duties and Encourage the Indus- tries of the United States, and for other Purposes," and approved August 5, 1909, and that, under and by virtue of the alleged au- thority of the provisions of Section thirty-eight of the said Act of Congress of the United States, the defendant, Fifty Associates, shall be liable to make, on or before the first day of March, 1910, a true and accurate return under oath or affirmation of its President, Vice- President or other principal officer, and its Treasurer, or Assistant- Treasurer, to the Collector of Internal Revenue for the Third Dis- trict of Massachusetts, setting forth:—

(*a*) The total amount of the paid up capital stock of the Fifty Associates outstanding on December 31, 1909.

(*b*) The total amount of the bonded and other indebtedness of the Fifty Associates on December 31, 1909.

(*c*) The gross amount of the income of the Fifty Associates re- ceived by it from all sources during the year ending December 31, 1909; also the amount received by the Fifty Associates within the said year by way of dividends upon stock of such corporations,

joint stock companies or associations, or insurance companies, as may be subject to the tax imposed.

(*d*) The total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of the Fifty Associates within the year ending December 31, 1909, stating separately all charges, such as rentals or franchise payments required to be made as a condition to the continued use or possession of property.

(*e*) The total amount of all losses actually sustained by the Fifty Associates during the year ending December 31, 1909, and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, if any.

(*f*) The amount of interest actually paid by the Fifty Associates within the year ending December 31, 1909, on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding its paid up capital stock outstanding at the close of the year 1909.

(*g*) The amount paid by the Fifty Associates within the year ending December 31, 1909, for taxes imposed under the authority of the United States or of the State of Massachusetts.

(*h*) The net income of the Fifty Associates after making the deductions authorized in Section thirty-eight of the said Act of Congress, above mentioned.

and, on or before the first day of March in each year thereafter, a like return in respect to the year ending with the thirty-first day of December preceding; and shall be liable to pay, on or before the thirtieth day of June, A. D., 1910, and of each year thereafter, an assessment described in said Act as a special excise tax with respect to the carrying on or doing business by the said corporation
11 equivalent to one per centum upon its entire net income, as ascertained in the way provided for in said Act, and set out in said return required to be made.

(11) Your orator further shows that, pursuant to the terms of said Act, the said return or returns, if made, and the returns of other corporations, if made, shall, as received by the Collector of Internal Revenue, be transmitted forthwith by the Collector to the Commissioner of Internal Revenue; that all such returns shall be retained by the Commissioner of Internal Revenue, who shall make assessment thereon on or before the first day of June, 1910, and of each year thereafter, and that, when the assessment is so made, all of the said returns, including that of the defendant corporation, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

(12) That your orator is informed and believes, and, therefore, avers, that said so-called real estate trusts are not subject to said provisions of Section thirty-eight of said Act of Congress, approved August 5, 1909, and that accordingly no returns or disclosures will be required to be made by such real estate trusts of the facts relating to their income and business, while, on the other hand, such Act, if constitutional and applicable to the defendant, Fifty Associates, will require it to disclose and make public statements relating to its

income and business, all to the manifest injury of the defendant, Fifty Associates, and to the prejudice and irreparable injury of your orator and other shareholders of the defendant, Fifty Associates, and to the advantage of said real estate trusts and the shareholders thereof.

(13) And your orator avers that the provisions of said Section thirty-eight of said Act of Congress, above referred to, pro-
12 viding for the laying of a special excise tax upon every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, with respect to the carrying on or doing business by such corporation, joint stock company or association, equivalent to one per centum (1%) upon the entire net income of each, over and above $5000.00, are as to the said defendant, Fifty Associates, a corporation, deriving its income wholly from real estate, unconstitutional, null and void for divers reasons and in divers respects, of which your complainant shows the following:—

(*a*) That the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section seven, in that the said Act above mentioned originated in the Senate of the United States, and was concurred in by the House of Representatives subsequently thereto, whereas it is required by said Article and Section of the Constitution of the United States that all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.

(*b*) That the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Sections two and nine, in that the tax imposed by the said Act, although described in said Act as a special excise tax, is in fact and in legal effect a direct tax and is not apportioned among the several States, according to their respective numbers, whereas it is required by the said Article and Sections of the Constitution that no direct tax shall be laid by Congress, unless in proportion to the census.

(*c*) That, if the tax imposed by the said Act of Congress is not a direct tax, then the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section eight thereof, in that the tax imposed thereby is not uniform throughout the United States, in this that the said Act of Congress exempts from the payment of said tax all corporations, joint stock companies or associations having an annual net income of less than $5000.00; and is not uniform throughout the United States in this that said Act exempts from the making of the return therein prescribed and from the payment of the tax thereby imposed all labor, agricultural or horticultural organizations and fraternal
13 beneficiary societies, orders or associations operating under the lodge system, and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders or associations, and dependents of such members and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, and all corporations or as-

sociations organized and operated exclusively for religious, charitable or educational purposes, no part of the income of which inures to the benefit of any private stockholder or individual; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations having like charters and franchises and enjoying like benefits under the laws of the United States and the several States; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations carrying on and doing the same and equal business and enjoying the same rights and privileges in regard to the carrying on and doing of such business; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations organized for profit, but not having a capital stock divided into shares; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations having an annual net income exceeding $5000.00, if said income is derived as dividends upon stock of corporations, joint stock companies or associations or insurance companies, subject to the tax thereby imposed; and is not uniform throughout the United States in this that the said Act exempts from the tax thereby imposed and from the making of returns thereby prescribed, individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit, whereby it is provided by said Article and Section of the Constitution of the United States that Congress shall have power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the general welfare of the United States, but that all duties, imposts and excises shall be uniform throughout the United States.

(*d*) That the said Act of Congress is in violation of the Constitution of the United States, and more particularly of the provisions of the Fifth Amendment thereto, in that under the provisions of the said Act the defendant corporation will be deprived of its property,

14 without due process of law, and particularly in this that, through the publicity of its business, the privacy of its affairs will be largely, if not entirely, destroyed, and its competitors will be able to gain an intimate knowledge of what have hitherto been the private affairs and concerns of the defendant corporation, while corresponding publicity of the private affairs and concerns of all other corporations, joint stock companies or associations will not necessarily result, nor will any corresponding publicity of the private affairs and concerns of individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit result; and in this that the said assessment if made will be laid upon the defendant corporation and not necessarily upon all other corporations, joint stock companies or associations, and not at all upon individuals, firms, co-partnerships and trusts, similar to

those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, even though they may be engaged in the carrying on or doing of the same or similar business, whereas it is provided by the Fifth Amendment to the Constitution that no person shall be deprived of his property without due process of law.

(*e*) That the said Act of Congress is in further violation of the Fifth Amendment to the Constitution, in that under the provisions of said Act the private property of the defendant corporation will be taken for public use without just compensation and without any compensation whatsoever, and especially in this that the private affairs, books, papers, records, business and trade-secrets of the defendant corporation and the contents of its books, papers and records are to be taken for publication and are to be given to the Collector of Internal Revenue and to the Commissioner of Internal Revenue and to the public in the form of public records, whereas it is provided by the Fifth Amendment to the Constitution that private property shall not be taken for public use without just compensation.

(*f*) That the said Act of Congress is in violation of the Constitution of the United States, and particularly of the provisions of the Fourth Amendment thereto, in that it violates the rights of the defendant corporation to be secure in its papers, effects, books, records, business, private affairs and trade-secrets against unreasonable searches and seizures, in this that by the provisions of said Act should the defendant corporation by its officers fail, neglect or refuse to make the return therein provided for the Commissioner of Internal Revenue is thereupon empowered to examine through any regularly appointed Revenue Agent all books and papers bearing upon the matters required to be included in the return and to make up a return therefrom, whereas it is provided by the Fourth Amendment to the Constitution that the right of the people to be secure in their papers and effects against unreasonable searches and seizures shall not be violated.

(*g*) That the said Act of Congress is in violation of the Constitution of the United States, in this that the requirement to make said return for public record and the requirement to pay said tax and the depriving thereby of the defendant corporation of its property without due process of law and the taking thereby of the private property of the defendant corporation for public use without just compensation, and the violation thereby of the right of the defendant corporation to be secure in its papers and effects against unreasonable searches and seizures, all as hereinbefore set forth, are burdens upon the charter and franchise of the defendant corporation, Fifty Associates, granted as aforesaid by the State of Massachusetts, and upon the right and power of the State of Massachusetts to grant, maintain and preserve the same to the defendant corporation and are an invasion and burden upon a prerogative, power, instrumentality and function of sovereignty belonging to the State of Massachusetts and which were never agreed to either expressly or by implication by the State of Massachusetts or by the people of the State of Massachusetts at the time the said State was admitted into the Union or before or since that time.

(*h*) That the said Act of Congress is in violation of the Constitution of the United States, and particularly of the Tenth Amendment thereto, in this, that the carrying on or doing of business for profit by a corporation, joint stock company or association created under the laws of the several States is not within the taxing power of the United States, and, any Act of Congress which by its terms imposes a tax upon the carrying on or doing of business for profit by any such corporation, joint stock company or association, imposes a burden and a tax upon and is an interference with the free exercise by the several States of the powers expressly reserved by the said States to charter and incorporate corporations and to grant charters and franchises to such corporations.

(*i*) That the said Act of Congress is not a proper exercise of the legislative power granted to Congress and that the said Act of Congress is otherwise in violation of the Constitution of the United States.

Wherefore, and, in consideration whereof and forasmuch
16 as your orator is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, your orator prays:

(1) That it may be adjudged and decreed that the said provisions of the said Act of Congress, approved August 5, 1909, so far as the same relate to a tax upon your orator, are unconstitutional, null and void.

(2) That the defendant company, its officers and agents and the individual defendants be enjoined and restrained *pendente lite* from voluntarily making the said return or paying the said tax or otherwise complying with the provisions of said Act.

(3) That the said defendants may be perpetually restrained as aforesaid.

(4) That your orator may have such other or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make, to the best and utmost of their knowledge, remembrance, information and belief, the said Fifty Associates, under its corporate seal, and the said individual defendants, not under oath (an answer under oath being hereby expressly waived) to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto; may it please your Honors to grant unto your orator a subpœna *ad respondendum* issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, Fifty Associates, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter and Francis C. Welch, commanding them and each of them on a day certain and under a certain penalty to be therein inserted
to appear before your Honors in this Honorable Court and
17 then and there full, true, direct and perfect answer make to all and singular the premises; and further to perform and

bide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional injunction and a writ of perpetual injunction to the same purport and effect as is hereinbefore set forth and prayed.

And your orator, as in duty bound, will ever pray, etc.

CHARLES H. TYLER,
OWEN D. YOUNG,
RANDOLPH FROTHINGHAM,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
District of Massachusetts:

Charles H. Tyler, being duly sworn, deposes and says: that he is one of the solicitors for the complainant, George Wendell Phillips, named in the foregoing bill of complaint; that the reason why this verification is not made by said Phillips is because he is absent from the State and District of Massachusetts; that deponent has read said bill and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that, as to those matters, he believes it to be true.

CHARLES H. TYLER.

Subscribed and sworn to before me this eighth day of February, A. D., 1910.

[SEAL.] RANDOLPH FROTHINGHAM,
Notary Public.

18 "EXHIBIT A."

BOSTON, *February* 2, 1910.

To Fifty Associates and the Board of Directors thereof, Boston, Mass.

DEAR SIRS: Mr. George Wendell Phillips, a stockholder in your corporation, having taken our counsel, has been advised by us that the provisions of the United States Corporation Tax Law, the same being Section 38 of the Tariff Act of 1909, may be, as far as the same may relate to the Fifty Associates, unconstitutional, null and void.

Mr. Phillips is informed that the Directors and Officers of the said corporation, believing the said Act to be constitutional and the Fifty Associates subject thereto, intend fully to comply with the terms thereof and make such return and pay such tax assessed, if any, as are therein provided for.

To make a return requiring the detailed business of the Fifty Associates will be to do an irreparable injury to the corporation, its business and its stockholders.

Therefore, Mr. Phillips, through his counsel, protests against your compliance with the terms of said Act; protests against your permitting the return to be made or the tax assessed to be paid, as provided by said Act, and requests that you will not voluntarily make and file the return or pay the tax, if any is assessed; and

further requests that, for the best interests of the corporation and for the protection of its business and its stockholders, you will contest by proper means the constitutionality of the said Act, which requires by its provisions the making and filing of such a
19 return and the payment of the tax assessed thereon.

Very truly yours,
(Signed) TYLER & YOUNG.

20 "EXHIBIT B."

BOSTON, MASS., *February* 2, 1910.

Messrs. Tyler & Young, Ames building, Boston, Mass.

DEAR SIRS: Replying to your request, in behalf of Mr. George Wendell Phillips, a stockholder of the Fifty Associates, that no return be made or taxes paid by the Fifty Associates under the Federal Corporation Tax Act, I beg to enclose a copy of the votes of the Board of Directors of the Fifty Associates, denying the request.

Very truly yours,
(Signed) CHARLES E. COTTING,
Clerk, Fifty Associates.

(*Enclosure to Above Letter.*)

BOSTON, *February* 2, 1910.

I hereby certify that at a meeting of the Directors of Fifty Associates, held today, a majority of the Directors being present, the following votes were passed:

Voted, That the Clerk of this corporation be, and he hereby is, authorized and directed to make reply to the letter bearing date of February 2, 1910, addressed to the Fifty Associates and the Board of Directors thereof and signed by Messrs. Tyler & Young, attorneys for George Wendell Phillips, and that such reply shall state that this Board is not confident that the act of Congress referred to is constitutional, but that the penalties imposed by the terms of said Act for the failure, refusal or neglect to make the return as therein provided are, in the opinion of this Board, so severe that it would be a dangerous thing to incur the imposing of them.

And be it further:

21 *Voted,* That in the event of further protest or request being made of this corporation or its Board of Directors by any other of its stockholders relative to action in regard to said so-called corporation tax law, the Clerk of this Board be, and he hereby is, authorized and directed to answer such inquiry or inquiries by advising said stockholder or stockholders of the action hereby taken.

And be it further:

Voted, That the President and Treasurer of this corporation be, and they are hereby, authorized and directed, in view of the foregoing votes, to make in the name and behalf of this corporation

the necessary returns required by Section 38 of the Tariff Act of 1909, imposing the tax on corporate income and thereafter if a tax be assessed upon such return or otherwise the Treasurer of the corporation is authorized to pay said tax under protest and take such proceedings as he may be advised by counsel are necessary to recover the same in case said assessment is determined to be illegal.

Attest:
(Signed) CHAS. E. COTTING, *Clerk.*

22 On the ninth day of February, A. D. 1910, the following Demurrer is filed:

Demurrer.

(Filed Feb. 9, 1910.)

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill. And, for causes of demurrer, show:

First. That said bill doth not contain any matter of equity whereon this Court can ground any decree or give to the complainant any relief against these defendants or any one or more of them.

Second. That it appeareth by the complainant's own showing by the said bill that he is not entitled to the relief prayed for in the bill against these defendants.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants separately and severally demur thereto and pray the judgment of this Honorable Court whether they, or any one of them, shall be compelled to make any answer to said bill; and they humbly pray to be hence dismissed, with their reasonable costs in this behalf sustained.

H. HUESTIS NEWTON,
Solicitor for Defendants.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

H. HUESTIS NEWTON,
Solicitor for Defendants.

23 UNITED STATES OF AMERICA,
District of Massachusetts:

I, Charles E. Cotting, being duly sworn, depose and say: I am one of the above named defendants. The foregoing demurrer is not interposed for purpose of delay.

CHAS. E. COTTING.

Sworn to, before me, this ninth day of February, 1910.
[SEAL.] ARTHUR N. MADDISON,
Notary Public.

Thereupon this cause is set down for hearing on demurrer and is fully heard by the Court, the Honorable Le Baron B. Colt, Circuit Judge, sitting, said demurrer being sustained by the Court, on the eleventh day of February, A. D. 1910.

On the same day, the following Final Decree was entered:

24 *Final Decree.*

February 11, 1910.

COLT, *J.:*

This cause having come on to be heard upon the bill and the demurrer thereto, it is hereby ordered and decreed that the said demurrer be sustained and that the bill of complaint above named be, and the same is hereby dismissed, with costs.

By the Court:

CHARLES K. DARLING, *Clerk.*

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

Judge's Certificate on Claim for Appeal.

Thereupon the above named complainant states that in this case the constitutionality of a law of the United States is drawn in question, and in open Court prays an appeal from said final decree direct to the Supreme Court of the United States, pursuant to the Statute in such case made and provided. It is, therefore, further ordered that the said appeal be, and the same is, hereby allowed as prayed for in open Court.

The said defendants then admitted in open Court due notice of the said appeal and duly waived service of any citation thereon.

LE BARON B. COLT,
U. S. Circuit Judge.

25 *Assignment of Errors.*

(Filed February 11, 1910.)

And now comes the complainant above named by Tyler & Young, his solicitors, and, in connection with the complainant's petition of appeal from the final decree made and entered herein on the eleventh day of February, 1910, dismissing the complainant's bill of complaint with costs, makes and files the following assignment of errors, in pursuance of the Statute and rule in such case made and provided:

I. That the Court erred in not holding that so much of the Act of Congress of the United States, entitled: "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes," approved August 5, 1909, as relates to the assessment and collecting of a tax on the net income of corporations

and the filing of returns of corporations, as specified in Section thirty-eight of the said Act, was unconstitutional, null and void, in that:

(*a*) The said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section seven, in that the said Act above mentioned originated in the Senate of the United States, and was concurred in by the House of Representatives subsequently thereto, whereas it is required by said Article and Section of the Constitution of the United States that all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.

(*b*) The said Act of Congress is in violation of the Constitution of the United States, and particularly Article one, Sections two and nine, in that the tax imposed by the said Act, although described in said Act as a special excise tax, is in fact and in legal effect a direct tax and is not apportioned among the several States, according to their respective numbers whereas it is required by the said Article and Sections of the Constitution that no direct tax shall be laid by Congress, unless in proportion to the census.

26 (*c*) If the tax imposed by the said Act of Congress is not a direct tax, then the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section eight thereof, in that the tax imposed thereby is not uniform throughout the United States, in this that the said Act of Congress exempts from the payment of said tax all corporations, joint stock companies or associations having an annual net income of less than $5000.00; and is not uniform throughout the United States in this that said Act exempts from the making of the return therein prescribed and from the payment of the tax thereby imposed all labor, agricultural or horticultural organizations and fraternal beneficiary societies, orders or associations operating under the lodge system, and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders or associations, and dependents of such members and domestic building and loan associations organized and operated exclusively for the mutual benefit of

27 their members, and all corporations or associations organized and operated exclusively for religious, charitable or educational purposes, no part of the income of which inures to the benefit of any private stockholder or individual; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations having like charters and franchises and enjoying like benefits under the laws of the United States and the several States; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations carrying on and doing the same and equal business and enjoying the same rights and privileges in regard to the carrying on and doing of such business; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations organized for profit, but not having a capital stock divided into shares; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations hav-

ing an annual net income exceeding $5000.00, if said income is derived as dividends upon stock of corporations, joint stock companies or associations or insurance companies, subject to the tax thereby imposed; and is not uniform throughout the United States in this that the said Act exempts from the tax thereby imposed and from the making of returns thereby prescribed, individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit, whereby it is provided by said Article and Section of the Constitution of the United States that Congress shall have power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the general welfare of the United States, but that all duties, imposts and excises shall be uniform throughout the United States.

(*d*) The said Act of Congress is in violation of the Constitution of the United States, and more particularly of the provisions of the Fifth Amendment thereto, in that under the provisions of the said Act, the defendant corporation will be deprived of its property, without due process of law, and particularly in this that, through the pub-
28 licity of its business, the privacy of its affairs will be largely, if not entirely, destroyed, and its competitors will be able to gain an intimate knowledge of what have hitherto been the private affairs and concerns of the defendant corporation, while corresponding publicity of the private affairs and concerns of all other corporations, joint stock companies or associations will not necessarily result, nor will any corresponding publicity of the private affairs and concerns of individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit result; and in this that the said assessment if made will be laid upon the defendant corporation and not necessarily upon all other corporations, joint stock companies or associations, and not at all upon individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, even though they may be engaged in the carrying on or doing of the same or similar business, whereas it is provided by the Fifth Amendment to the Constitution that no person shall be deprived of his property without due process of law.

(*e*) The said Act of Congress is in further violation of the Fifth Amendment to the Constitution, in that under the provisions of said Act the private property of the defendant corporation will be taken for public use without just compensation and without any compensation whatsoever, and especially in this that the private affairs, books, papers, records, business and trade-secrets of the defendant corporation and the contents of its books, papers and records are to be taken for publication and are to be given to the Collector of Internal Revenue and to the Commissioner of Internal Revenue and to the public in the form of public records, whereas it is provided

by the Fifth Amendment to the Constitution that private property shall not be taken for public use without just compensation.

(*f*) The said Act of Congress is in violation of the Constitution of the United States, and particularly of the provisions of the Fourth Amendment thereto, in that it violates the rights of the defendant corporation to be secure in its papers, effects, books, records, business, private affairs and trade-secrets against unreasonable searches and seizures, in this that by the provisions of said Act should the defendant corporation by its officers fail, neglect or refuse to make the return therein provided for the Commissioner of Internal Revenue is thereupon empowered to examine through any regularly appointed Revenue Agent all books and papers bearing upon
29 the matters required to be included in the return and to make up a return therefrom, whereas it is provided by the Fourth Amendment to the Constitution that the right of the people to be secure in their papers and effects against unreasonable searches and seizures shall not be violated.

(*g*) The said Acts of Congress is in violation of the Constitution of the United States, in this that the requirement to make said return for public record and the requirement to pay said tax and the depriving thereby of the defendant corporation of its property without due process of law and the taking thereby of the private property of the defendant corporation for public use without just compensation, and the violation thereby of the right of the defendant corporation to be secure in its papers and effects against unreasonable searches and seizures, all as hereinbefore set forth, are burdens upon the charter and franchise of the defendant corporation, Fifty Associates, granted as aforesaid by the State of Massachusetts, and upon the right and power of the State of Massachusetts to grant, maintain and preserve the same to the defendant corporation and are an invasion and burden upon a prerogative, power, instrumentality and function of sovereignty belonging to the State of Massachusetts and which were never agreed to either expressly or by implication by the State of Massachusetts or by the people of the State of Massachusetts at the time the said State was admitted into the Union or before or since that time.

(*h*) The said Act of Congress is in violation of the Constitution of the United States, and particularly of the Tenth Amendment thereto, in this, that the carrying on or doing of business for profit by a corporation, joint stock company or association created under the laws of the several States is not within the taxing power of the United States, and, any Act of Congress which by its terms imposes a tax upon the carrying on or doing of business for profit by any such corporation, joint stock company or association, imposes a burden and a tax upon and is an interference with the free exercise by the several States of the powers expressly reserved by the said States to charter and incorporate corporations and to grant charters and franchises to such corporations.

(*i*) The said Act of Congress is not a proper exercise of the legislative power granted to Congress and that the said Act of Congress is otherwise in violation of the Constitution of the United States.

II. That the Court erred in not granting to the complainant relief prayed in and by his bill or any part thereof.
III. That the Court erred in sustaining the demurrer to said bill.
IV. That the Court erred in dismissing the said bill with costs.

CHARLES H. TYLER,
OWEN D. YOUNG,
RANDOLPH FROTHINGHAM,
Solicitors for Complainant.

Dated, Boston, Massachusetts, February 11th, 1910.

Approved:
LE BARON B. COLT,
U. S. Circuit Judge.

Bond on Appeal.

(Filed and Approved Feb. 11, 1910.)

Know all Men by these Presents, That we, George Wendell Phillips, of Reno, in the State of Nevada, as principal, and American Bonding Company of Baltimore, a corporation organized under the laws of the State of Maryland, and having a usual place of business in Boston, in the County of Suffolk and Commonwealth of Massachusetts, as surety, are held and firmly bound unto Fifty Associates, a Massachusetts corporation, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter and Francis C. Welch in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the said Fifty Associates, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter and Francis C. Welch their certain attorneys, successors, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this eleventh day of February in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts in a suit in Equity depending in said Court between George Wendell Phillips, complainant, and Fifty Associates, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter, and Francis C. Welch, defendants, a decree was entered against the said George Wendell Phillips and the said George Wendell Phillips having obtained in open court an appeal to remove said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Fifty Associates, Charles W. Amory, Charles E. Cotting, Charles F. Adams, 2nd, Francis I. Amory, Philip Dexter and Francis C. Welch citing and admonishing them to be and appear in the said Supreme Court of the United States, in the city of Washington, in the District of Columbia, on the sixteenth day of February, A. D. 1910.

Now, the condition of the above obligation is such, That if the said George Wendell Phillips shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE WENDELL PHILLIPS,
By TYLER & YOUNG, *His Att'ys.*
AMERICAN BONDING COMPANY, [SEAL.]
By JAMES R. CHANDLER, *Vice Pres't.*

Attest:
MARY E. MOLSON, *Ass't Sec'y.*

Sealed and delivered in presence of
——— ———.
——— ———.
——— ———.

Approved:
LE BARON B. COLT,
U. S. Circuit Judge.

32 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Fifty Associates, a corporation, organized and existing under the laws of the State of Massachusetts, and having its principal office and place of business in Boston, in that State, a citizen of the State of Massachusetts; Charles W. Amory, of said Boston, a citizen of the State of Massachusetts; Charles E. Cotting, of said Boston, a citizen of the State of Massachusetts; Charles F. Adams, 2nd, of Concord, a citizen of the State of Massachusetts; Francis I. Amory, of said Boston, a citizen of the State of Massachusetts; Philip Dexter, of said Boston, a citizen of the State of Massachusetts; and Francis C. Welch, of said Boston, a citizen of the State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the* sixteenth day of February next, pursuant to an Appeal duly obtained from a decree of the† Circuit Court of the United States for the District of Massachusetts wherein George Wendell Phillips, a citizen of the State of Nevada and a resident of Reno, in said State, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Judge of the Circuit Court of the United States for the District of Massachusetts this

eleventh day of February, in the year of our Lord one thousand nine hundred and ten.

LE BARON B. COLT,
U. S. Circuit Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

33 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 682, George Wendell Phillips, Complainant, v. Fifty Associates et al., Defendants, in said Circuit Court determined, Judge's Certificate on Claim for Appeal, the Assignment of Errors, the Bond on Appeal, and also the original Citation issued upon the appeal of the complainant in said cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this fourteenth day of February, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,023. Massachusetts C. C. U. S. Term No. 797. George Wendell Phillips, appellant, vs. Fifty Associates et al. Filed February 16, 1910. File No. 22,023.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 797.

GEORGE WENDELL PHILLIPS, APPELLANT,

v.

FIFTY ASSOCIATES, CHARLES W. AMORY, CHARLES E. COTTING, CHARLES F. ADAMS, 2ND, FRANCIS I. AMORY, PHILIP DEXTER, AND FRANCIS C. WELCH.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MOTION TO ADVANCE UNDER RULE 26.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now George Wendell Phillips, appellant herein, and respectfully prays this Honorable Court that the above entitled cause may be advanced upon the docket of this court and set down for oral argument on the 14th day of March next, together with the cause of Flint *vs.* Stone Tracy

Company *et al.*, No. 747, and other causes assigned therewith involving the constitutionality of that part of an act of Congress, approved August 5, 1909, commonly known as the Federal Corporation Tax Law, for the reasons that will be made to appear hereafter.

I.

That this suit is one of a civil nature cognizable in equity; that this suit arises under the Constitution of the United States and under the laws thereof; that this suit is a controversy between citizens of different States and the matter in dispute exceeds, exclusive of interest and costs a sum or value of $2,000; and that this suit arises under the Internal Revenue Laws of the United States.

II.

The appellant, George Wendell Phillips, a citizen of the State of Nevada and a stockholder in the defendant corporation, Fifty Associates, organized and existing under the laws of the State of Massachusetts, has brought this bill in his own behalf (and in behalf of all other stockholders who are similarly situated and who shall be entitled to avail themselves of the benefit thereof) against the defendant corporation, Fifty Associates, its officers and directors, alleging that the defendants in compliance with the provisions of the said act of Congress entitled, "An act to provide revenue, equalize duties and encourage the industries of the United States and for other purposes," intend to make the required return and also intend voluntarily to pay the tax if any shall be assessed upon such part of its net income as shall be in excess of $5,000. The bill alleges that the provisions of said act of Congress which purport to require the making of such return and the payment of such tax are unconstitutional, null and void, and the appellant seeks therein to restrain the intended voluntary compliance by the defendants with the provisions of said act.

III.

In brief, the bill alleges that the defendant corporation was incorporated by special act of the legislature of the State of Massachusetts, approved February 21, 1820, and by virtue of said act has full power to possess, purchase, sell, improve, and manage real, leasehold, or other estate; that by said special act a charter was granted to the said Fifty Associates without any reservation to the State of Massachusetts of a right or power to amend, alter or repeal the same, which said charter thereby constitutes a contract right granted by said State to said defendant corporation; that the property of said defendant is divided into 1,000 shares without par value, and consists wholly of real estate or interest therein, or leaseholds thereof, and the income therefrom, except as the same may be derived from accumulated profits, is exclusively derived from real estate; that the business of said corporation, so far as it may be called a business, is the holding and managing of its said property and that such business is transacted and conducted wholly within the city of Boston in said State; that under the general laws of the State of Massachusetts a corporation may not be organized for the purpose of buying and selling real estate; that the granting of corporate franchises for that purpose has always been limited to special acts of the legislature; that the business of holding, managing and leasing real estate in large parcels in the city of Boston in competition with the defendant Fifty Associates is largely conducted and carried on by so-called real estate trusts, and the appellant alleges that real estate in the city of Boston, assessed at more than $75,000,000, is held by such real estate trusts, and further alleges that he is informed and believes that such so-called real estate trusts, although having transferable shares, traded in substantially as are those of the defendant, and with limited liability on the part of the holders thereof, the same not being organized under any general or special law, are not subject to said provisions of said act of Congress above referred to,

and that consequently the real estate trusts, the competitors of the defendant corporation, Fifty Associates, are not to be required to make returns and disclosures relative to their income and business, while the provisions of said act, if constitutional and applicable to the defendant Fifty Associates, will require it to disclose and make public statements relative to its income and business, all to the manifest injury of the defendant Fifty Associates and to the prejudice and irreparable injury of the appellant and other shareholders of the defendant Fifty Associates.

IV.

Defendants filed a general demurrer to this bill and the cause having come on to be heard upon the bill and demurrer thereto in the United States Circuit Court for the District of Massachusetts the demurrer was sustained, the bill was dismissed and an appeal to this court was brought and allowed.

V.

The questions of law involved herein are of great public interest and importance and arise under a revenue law of the United States, and unless the adjudication of this Honorable Court as to the constitutionality of the law in question is speedily obtained this and other corporations will be obliged to file their returns and pay the tax assessed, if any, under protest, with a resultant multiplicity of suits.

VI.

The bill alleges that the provisions of section 38 of the said act, above referred to as the Federal Corporation Tax Law, are in violation of the provisions of the Constitution of the United States and are null and void for the following reasons:

(1) That the said tax provisions of said act, the same providing for an entirely distinct and independent source of revenue, originated in the Senate of the United States, and is not germane to any of the revenue provisions of said act originating in the House of Representatives, as is required by article 1, section 7, of the Constitution.

(2) That said section 38 of the said act provides for a direct tax, which is not apportioned among the several States in proportion to the census, as is required by article 1, sections 2 and 9, of the Constitution.

(3) That if the said section of said act be held not to provide for a direct tax, but to impose a special excise tax, then the said act by its provisions is in divers respects not uniform throughout the States, as is required by article 1, section 8, of the Constitution.

(4) That the said section of said act is in violation of the Fifth Amendment to the Constitution of the United States in that under the provisions of the said section the defendant corporation will be deprived of its property without due process of law and the private property of the defendant corporation will be taken for public use without just compensation.

(5) That the said section of said act by its terms violates the right of the said corporation to be secure in its papers and effects against unreasonable searches and seizures, as is secured to it by the Fourth Amendment to the Constitution.

(6) That the said section of said act by its terms is an invasion of, and a burden upon, the reserved rights of the State of Massachusetts, as are secured to it by the Tenth Amendment to the Constitution.

VII.

The appellant is informed that in the cause of Flint *vs.* Stone Tracy Company *et al.*, and in other like causes which have already been advanced for hearing, the constitutionality of the said Corporation Tax Law is involved, but your appellant is informed and believes and therefore avers that the questions raised by him in his bill of complaint as aforesaid are in many respects different and distinct from those raised in the other causes.

Waiver of notice of this motion by counsel for the appellees has been filed with the clerk of this court. Notice of this motion has been given to the Attorney General of the United States and to the Solicitor General of the United States.

Respectfully submitted.

A. R. SERVEN,
BARRY MOHUN,
B. E. EAMES,
Of Counsel for Appellants.

WASHINGTON, *February* 19, 1910.

Supreme Court of the United States

OCTOBER TERM, 1909

No. ~~707~~ 443

Office Supreme Court, U. S.
FILED.
MAR 10 1910
JAMES H. McKENNEY
Clerk.

GEORGE WENDELL PHILLIPS
Appellant

v.

FIFTY ASSOCIATES, et Al.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLANT

BOSTON
GEO. H. ELLIS CO., PRINTERS, 272 CONGRESS STREET
1910

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Supreme Court of the United States.

October Term, 1909.
No. 797.

GEORGE WENDELL PHILLIPS, *Appellant*

v.

FIFTY ASSOCIATES, *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLANT.

This is an action brought originally in the Circuit Court of the United States for the District of Massachusetts by George Wendell Phillips as a shareholder in the Fifty Associates, a Massachusetts corporation, against that Company and its officers and directors to restrain them from making the return or paying the tax or otherwise complying with the provisions of Section 38 of the Act of Congress approved August 5, 1909, known as the "Corporation Tax Law."

The material provisions of the Act are as follows:—

> "That every corporation, joint stock company or association, organized for profit and having a

capital stock represented by shares, and ... surance company, now or hereafter or... in- shall be subject to pay annually a spe... tax with respect to the carrying on or doi...cise by such corporation, joint stock company...ness ation, or insurance company, equivalent ...oci- centum upon the entire net income over per five thousand dollars received by it from ...ove during such year, exclusive of amounts ...rees it as dividends upon stock of other co... by joint stock companies or associations, ...ons, companies, subject to the tax hereby im...nce

The action is in equity. It is founded, as ... tion, first, upon diverse citizenship, the appe...dic- a citizen of the State of Nevada, and the appe...eing zen of the State of Massachusetts, and the ...citi- dispute exceeding, exclusive of interest and ...r in sum of $2,000, and second, upon the fact that ... the arising under the Constitution and laws of ... suit States, and especially under the Internal Re... ited of the United States. ...aws

A demurrer was filed on behalf of the defen... and in the Court below, the demurrer was sustain... the bill dismissed.

The plaintiff appealed directly to this Court ...ant to the Statute.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows:—

I. That the Court erred in not holding that so much of the Act of Congress of the United States, entitled: "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States and for Other Purposes," approved August 5, 1909, as relates to the assessment and collecting of a tax on the net income of corporations and the filing of returns of corporations, as specified in Section thirty-eight of the said Act, was unconstitutional, null and void, in that:

(*a*) the said Act of Congress is in violation of the Constitution of the United States, and particularly of Article one, Section seven, in that the said Act above mentioned originated in the Senate of the United States, and was concurred in by the House of Representatives subsequently thereto, whereas it is required by said Article and Section of the Constitution of the United States, that all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.

(*b*) The said Act of Congress is in violation of the Constitution of the United States, and particularly Article one, Sections two and nine, in that the tax imposed by the said Act, although described in said Act as a special excise tax, is in fact and in legal effect a direct tax and is not apportioned among the several States, according to their respective numbers whereas it is required by the said Article and Sections of the Constitution that no direct tax shall be laid by Congress, unless in proportion to the census.

(*c*) If the tax imposed by the said Act of Congress is not a direct tax, then the said Act of Congress is in violation of the Constitution of the United States,

and particularly of Article one, Section eight thereof, in that the tax imposed thereby is not uniform throughout the United States, in this that the said Act of Congress exempts from the payment of said tax all corporations, joint stock companies or associations having an annual net income of less than $5000.00; and is not uniform throughout the United States in this that said Act exempts from the making of the return therein prescribed and from the payment of the tax thereby imposed all labor, agricultural or horticultural organizations and fraternal beneficiary societies, orders or associations operating under the lodge system, and providing for the payment of life, sick, accident and other benefits to the members of such societies, orders or associations, and dependents of such members and domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, and all corporations or associations organized and operated exclusively for religious, charitable or educational purposes, no part of the income of which inures to the benefit of any private stockholder or individual; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations having like charters and franchises and enjoying like benefits under the laws of the United States and the several States; and is not uniform throughout the United States in this that it is not imposed equally upon corporations, joint stock companies and associations carrying on and doing the same and equal business and enjoying the same rights and privileges in regard to the carrying on and doing of such business; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations organized for profit, but not having a capital stock divided into shares; and is not uniform throughout the United States in this that it is not imposed upon corporations, joint stock companies or associations having an

annual net income exceeding $5000.00, if said income is derived as dividends upon stock of corporations, joint stock companies or associations or insurance companies, subject to the tax thereby imposed; and is not uniform throughout the United States in this that the said Act exempts from the tax thereby imposed and from the making of returns thereby prescribed, individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit, whereby it is provided by said Article and Section of the Constitution of the United States that Congress shall have power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the general welfare of the United States, but that all duties, imposts and excises shall be uniform throughout the United States.

(*d*) The said Act of Congress is in violation of the Constitution of the United States, and more particularly of the provisions of the Fifth Amendment thereto, in that under the provisions of the said Act, the defendant corporation will be deprived of its property, without due process of law, and particularly in this that, through the publicity of its business, the privacy of its affairs will be largely, if not entirely, destroyed, and its competitors will be able to gain an intimate knowledge of what have hitherto been the private affairs and concerns of the defendant corporation, while corresponding publicity of the private affairs and concerns of all other corporations, joint stock companies or associations will not necessarily result, nor will any corresponding publicity of the private affairs and concerns of individuals, firms, co-partnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, carrying on and doing the same or similar business for profit result; and in this that the said assessment if made will be laid upon the de-

fendant corporation and not necessarily upon all other corporations, joint stock companies or associations, and not at all upon individuals, firms, copartnerships and trusts, similar to those hereinbefore described, of some of which the shareholders enjoy freedom from a general partnership liability, even though they may be engaged in the carrying on or doing of the same or similar business, whereas it is provided by the Fifth Amendment to the Constitution that no person shall be deprived of his property without due process of law.

(*e*) The said Act of Congress is in further violation of the Fifth Amendment to the Constitution, in that under the provisions of said Act the private property of the defendant corporation will be taken for public use without just compensation and without any compensation whatsoever, and especially in this that the private affairs, books, papers, records, business and trade-secrets of the defendant corporation and the contents of its books, papers and records are to be taken for publication and are to be given to the Collector of Internal Revenue and to the Commissioner of Internal Revenue and to the public in the form of public records, whereas it is provided by the Fifth Amendment to the Constitution that private property shall not be taken for public use without just compensation.

(*f*) The said Act of Congress is in violation of the Constitution of the United States, and particularly of the provisions of the Fourth Amendment thereto, in that it violates the rights of the defendant corporation to be secure in its papers, effects, books, records, business, private affairs and trade-secrets against unreasonable searches and seizures, in this that by the provisions of said Act should the defendant corporation by its officers fail, neglect or refuse to make the return therein provided for the Commissioner of Internal Revenue is thereupon empowered to examine through any regularly appointed Revenue Agent all books and papers bearing upon the matters required to be included in the return

and to make up a return therefrom, whereas it is provided by the Fourth Amendment to the Constitution that the right of the people to be secure in their papers and effects against unreasonable searches and seizures shall not be violated.

(*g*) The said Act of Congress is in violation of the Constitution of the United States in this that the requirement to make said return for public record and the requirement to pay said tax and the depriving thereby of the defendant corporation of its property without due process of law and the taking thereby of the private property of the defendant corporation for public use without just compensation, and the violation thereby of the right of the defendant corporation to be secure in its papers and effects against unreasonable searches and seizures, all as hereinbefore set forth, are burdens upon the charter and franchise of the defendant corporation, Fifty Associates, granted as aforesaid by the State of Massachusetts, and upon the right and power of the State of Massachusetts to grant, maintain and preserve the same to the defendant corporation and are an invasion and burden upon a prerogative, power, instrumentality and function of sovereignty belonging to the State of Massachusetts and which were never agreed to either expressly or by implication by the State of Massachusetts or by the people of the State of Massachusetts at the time the said State was admitted into the Union or before or since that time.

(*h*) The said Act of Congress is in violation of the Constitution of the United States, and particularly of the Tenth Amendment thereto, in this, that the carrying on or doing of business for profit by a corporation, joint stock company or association created under the laws of the several States is not within the taxing power of the United States, and any Act of Congress which by its terms imposes a tax upon the carrying on or doing of business for profit by any such corporation, joint stock company or association, imposes a burden and a tax upon and

is an interference with the free exercise by the several States of the powers expressly reserved by the said States to charter and incorporate corporations and to grant charters and franchises to such corporations.

(*i*) The said Act of Congress is not a proper exercise of the legislative power granted to Congress and that the said Act of Congress is otherwise in violation of the Constitution of the United States.

II. That the Court erred in not granting to the complainant relief prayed in and by his bill or any part thereof.

III. That the Court erred in sustaining the demurrer to said bill.

IV. That the Court erred in dismissing the said bill with costs.

These assignments of error set up various grounds upon which the appellant contends that the Act in question is unconstitutional and void, and also set up generally that the Court erred in not granting the relief prayed for and in sustaining the demurrer and in dismissing the bill.

The appellant contends:—

(1) That the defendant corporation is not within the provisions of said Act.

(2) That if the defendant corporation is within said Act, the Act is unconstitutional and void.

I.

The Defendant Corporation is not Within the Statute.

The appellant's first contention is that the defendant is not within the intention of the law and therefore not subject to the tax. It is important, therefore, at the outset to consider what corporations are included within the scope of the statute, and upon what, speaking precisely, the tax in question is levied.

1. The Act applies only to such corporations as are carrying on or doing business.

The appellant will contend, for reasons set out at length below, that although the tax is described in the Act as an "excise" tax, it is not such in fact, but is in substance and in reality a tax upon income.

If, however, it is to be regarded as an excise, there are three possible views as to what is the precise thing upon which the tax falls.

> (1) That it is a tax upon the franchise granted by the State whereby individuals are enabled to do business in the corporate form and with limited liability.
>
> (2) That it is a tax not upon the franchise itself which is granted by the State, but upon the exercise of the franchise.
>
> (3) That it is a tax not upon the franchise nor upon the exercise of the franchise simply, but only an excise upon "the carrying on or doing business."

For purposes of the present discussion, it is sufficient to say that if the tax be regarded as laid in reality upon income it is, at least as to such portion of income of any corporation as is derived from real estate or from invest-

ment in personal property, a direct tax, and, therefore, unconstitutional under the doctrine of the case of *Pollock* v. *Farmers Loan & Trust Company*, 157 U. S. 429, and on re-hearing, 158 U. S. 601.

Regarding the tax, however, for present purposes as a true excise tax, if the first of the three views above set out be taken, namely, that it is a tax upon the franchise granted by the State, the appellant believes that it is likewise unconstitutional under the doctrine of the many cases which deny to the Federal government the right to tax the instrumentalities of the States. See for example the case of *Knowlton* v. *Moore*, 178 U. S. 41, to the effect in substance that Congress may not tax the power of the State to regulate successions although it may tax the recipient who takes property in accordance with such regulations.

Either of the remaining views may conceivably be taken, namely, that it is a tax upon the exercise of the corporate franchise or that it is a tax upon carrying on or doing business.

The wording of the act would seem to indicate that it is not intended to levy the tax upon any corporation *unless* it is engaged in carrying on or doing business, and, therefore, that the mere fact of a corporation exercising its franchise does not subject it to the tax. A corporation may be exercising its franchise and still not be engaged in "business." No corporation is taxable under the act, unless it is engaged in business. The conclusion would seem to follow, therefore, that the tax is intended to be levied upon "carrying on or doing business."

It is suggested, however, that it may not be necessary to carry the analysis of the precise subject of the tax to this extent, for the Act seems to indicate that, in any event, whatever is the subject of the tax, unless a corporation is engaged in "carrying on or doing business,"

it is not intended to be taxed. There are only two alternatives, namely:—

(1) Either it is a tax upon the exercise of the franchise and is imposed upon such exercise only when the corporation is engaged in business, or

(2) It is a tax on the "carrying on or doing business" itself.

In neither case is any corporation to be taxed unless it is so engaged in business.

2. The Defendant Corporation is Not "Carrying on or Doing Business."

It appears from the record (pp. 2–3), that the defendant corporation was chartered by the Commonwealth of Massachusetts in the year 1820, that this charter was granted to the Company without any reservation to the State of the right or power to amend, alter or repeal, that

> "the property of said corporation consists wholly of real estate or interest therein or leaseholds thereof, except such amounts of income as may from time to time have been set apart as surplus or reserved for working capital or such income as may have been accumulated but not declared in dividends,"

and also that

> "the business of said corporation, so far as it may be called a business, is the holding and managing of the property aforesaid, and such business is transacted and conducted wholly within the City of Boston, in said Commonwealth, and the income of said corporation, except as the same may be derived from accumulated profits, is exclusively derived from real estate; and that although empowered by its

> charter to buy and sell real estate, and build, pull down and rebuild the same as a business, the said corporation is not engaged in the doing of the same as a business for profit, nor is it so engaged at all, except in so far as the doing of the same may be an incident to the management of its property or the investment of its funds."

In the ordinary acceptation of the words, do such acts as have been described,—such care and management over real estate investments,—constitute the "carrying on or doing business?"

It was decided in the *Pollock* case that the income from real property or investments in personal property could not be taxed under the income tax law.

It was also decided in the *Spreckels Sugar Refining Company* case [192 U. S. 397], that under the law which imposed a special excise tax upon the business of refining sugar, measuring such tax by the gross income from the business, the income from real estate which was primarily used by the company in connection with and in the prosecution of its business of sugar refining, was properly included in computing the tax.

If the tax in the *Pollock* case had been nominally an excise tax upon the doing of the business of investing one's own property, it is scarcely conceivable that the Court would have reached any different conclusion as to the directness of the tax. If an individual were compelled to pay a tax upon the income from his investments in real estate, it would not matter whether the tax were called a tax upon his income from that source, or whether he were described as being engaged in the business of investing his property in real estate.

Every person who has investments in real estate, unless they be of that unusual character which is sometimes found,—namely, very long leases where the owner

parts entirely with the control of the property and simply remains passive and receives the rentals,—is obliged, in the proper care of his investments, to look after his property, to make repairs when needed, and to attend to the making of leases, enforcing collection of rentals, evicting tenants, paying taxes, and generally the care and management of the property. This was doubtless true in the *Pollock* case, and it requires no argument to show that if a similar tax was admitted to be levied upon the business of managing real estate, then so far as such so-called "business" consisted in the management of one's own investments in real estate and the proper care and oversight over one's property as incidental to such investments, such tax would be open to the same identical objections which were found insuperable in the *Pollock* case. In other words, it would not help the tax to change its name.

If the tax be regarded, therefore, as a tax upon the doing of business, it cannot be applied to the so-called business conducted by the defendant Company, for if it did, it would be, at least as to such Company, unconstitutional and void.

Let us assume a corporation owning real estate, all of which it has leased for a long term of years so that the only reason for the existence of the corporation is that it may receive the rentals from such real estate and transmit the same to its stockholders. We have, then, a case of pure investment. In such case it would seem clear that a tax "with respect to the receipt of such income" is a tax upon the income itself. To call this receiving of income a "business" and to hold that by so doing the tax which was before unconstitutional and void can be made constitutional and valid, would be a mere subterfuge. But, as has been noted above, all investments in real estate, apart from this exceptional kind of

investment, involve as incidental thereto some degree of care and attention to the property.

The question then is,—does this care and attention which is given by an owner to his property as incidental merely to the protection and preservation of his investment, constitute the carrying on or doing business within the meaning of this act? We are led to the conclusion that it does not, and that this is independent of the question whether these same incidental acts of care and management, if done independently by some one other than an owner of such property, would or would not constitute the "carrying on or doing business" within the statute.

In *Parker Mills* v. *Commissioners of Taxes*, 23 New York, 242, a statute of the State of New York enacted that all persons and associations "doing business" in the State of New York, as merchants, bankers or otherwise, and not residents of the State of New York, should be assessed and taxed on all sums invested in any manner in such business. The Parker Mills was a foreign corporation manufacturing nails in Massachusetts and Rhode Island. It had a depot and agent in the City of New York to whom it transmitted nails for sale. Its only business within the State of New York consisted in making such sales, the proceeds of which were remitted to the corporation in Massachusetts. The annual sales of the agent in New York City amounted to about Three Hundred Thousand Dollars ($300,000.00) and the value of the nails which he had in store was Ten Thousand Dollars ($10,000.00). The Court said, (per Selden, J., pages 243-244),—

> "The words descriptive of the property in respect to which they are to be assessed, are among the most indefinite in the language. The word 'business' embraces everything about which a person can be

> employed; and a sum is 'invested' whenever its amount is represented by anything but money. No conclusion can be arrived at in this case, by following out the precise lexicographical meaning of these terms. The statute is to be interpreted, therefore, by the light to be obtained from its general scope and tenor: from other statutes *in pari materia:* and from a consideration of the evils and abuses at which it was aimed."

and the Court proceeded to hold that the acts which took place in New York were so far merely incidental to the manufacturing business of the Company that they did not constitute the doing of business within the statute, and consequently that the corporation was not subject to the tax.

In *Re Alabama and Chattanooga Railroad Company*, 9 Blatchford 390, a petition in involuntary bankruptcy was filed in the Southern District of New York, against the railroad company, under the bankruptcy act of 1867, whereby such proceeding might be prosecuted in the district in which the debtor had carried on business for a stated time. The railroad Company was an Alabama corporation owning and operating a railroad in the States of Alabama, Georgia, Mississippi and Tennessee. It appeared that the Company had an office in New York City where its officers acted, its board of directors met, and where it contracted debts and made loans, purchases and payments. The Court said, (per Woodruff, J., page 397),—

> "In its broadest sense, the term 'business' includes nearly all the affairs in which either an individual or a corporation can be actors. . . . The conduct of any and all of the affairs of a corporation is business. Does, then, the doing of any acts whatever pertaining to the affairs of a railroad corporation constitute 'carrying on business,' in the

sense of the Act? Has the term, 'carrying i-
ness,' the same meaning as 'transacting a
business'? If the necessities or interests o-
road company require that an agent should t
to a timber region to purchase or otherwise e
(*e.g.*, by cutting, sawing, etc.) materials s
superstructure, is that carrying on busines
If it send an agent or agents, to a city, the
capital, to negotiate its bonds and raise m
aid of the construction of its road, and such
be continued for that purpose, and for receivi
quent remittances and making payments of
or other indebtedness, at an office provided
is that carrying on business in such city, wi
meaning of the Act? I am constrained, not
considerations already suggested, but by wha
the words themselves, should be deemed thei
interpretation, to answer these questions in t
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many affairs which are merely incidental, an
may be, and often are, transacted elsewhere
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as a carrying on of business, in the sense of
"Carrying on business" looks to the scheme
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We deduce from the foregoing, therefore:—

First. That the present act is to be interpreted not by giving the broadest possible interpretation to the words, "carrying on or doing business" because that would lead to results at once unreasonable and unconstitutional.

Second. That the carrying on or doing business is not to be applied to every activity of a corporation; and that, where similar language has been used in other cases, the Courts have restricted the application of the words to the principal or primary pursuit or occupation of the Company and have not extended it to matters purely incidental.

Following out this reasoning, it would seem appropriate that if the principal pursuit of a corporation is not such as would be properly described as "carrying on or doing business" any acts or things which it might do as incidental to such principal pursuit should be regarded merely as merged in the principal pursuit and not independently "carrying on or doing business."

Construing this Act, therefore, in the light of previous statutes and of the line of cases in which those statutes have been passed upon, the natural conclusion is as follows.

If a corporation is engaged solely in the occupation or pursuit of investing its money in either real estate or personal property and if it does nothing except such acts and things as are purely incidental to its investments and to a proper care and attention to the subject of the investment for the protection and preservation thereof, then it is not engaged in business within the Act even though such acts done by it as incidental to its investing operations might, if done by others as an independent pursuit, fall within the statute.

On the other hand, if a corporation is principally engaged in some form of occupation which is clearly to be regarded as the doing of business, such, for example, as the common forms of manufacturing or mercantile pursuits, and if in the conduct of such business it uses real estate incidentally and such real estate contributes to the aggregate income from the business, yet it is proper in case of an excise tax upon such business, to measure the amount of the tax by the entire income without deducting anything on account of the real estate.

The decision in the *Spreckels* case goes to the point of deciding that in the case of such excise tax upon the business of sugar refining, the income from real estate actually used by the Company and primarily so used as incidental to the carrying on of its business of sugar refining may be included in the income from the business, for the purpose of measuring the amount of the tax.

The distinction above indicated is the natural result from the conclusions reached in the *Pollock* case and the *Spreckels* case; the one holding that the income from real estate and invested personal property is not taxable without apportionment, and the other that the income from real estate actually used primarily as incidental to a business which is properly subject to an excise tax, may be included in measuring the amount of the excise tax upon such business.

If we were to assume for a moment, for purposes of argument, that certain acts and things, when done by an individual, do not constitute the "carrying on or doing business," it would seem fairly to follow that if the same acts and things were done by a corporation, they would likewise not constitute the "carrying on or doing business" by the corporation. So, if we assume that an

individual, in investing his money and doing such things as are essential for properly protecting and caring for his investment, is not engaging in business, it would seem to follow that a corporation in doing the same things is not engaging in business, any more than the individual.

If this be conceded, and if the words "carrying on or doing business" in the present Act are to be construed as including such acts of investment, corporations would be taxed directly on their income from real estate and invested personal property. Assuming the present Act to be valid, then, we are brought into direct conflict with the *Pollock* case. The Congress would be able, by a slight change in language from the law of 1894, to enact a general law taxing incomes from invested real estate and personal property. It would be necessary only to describe the tax as laid upon this so-called "business" of investing one's funds, instead of upon the income itself.

If the *Pollock* case is to stand,—and all the debates in the Congress assumed the validity of that decision——the result above pointed out would seem to indicate strongly that Congress could not have intended the phrase "carrying on or doing business" to include such investment.

Let us consider the matter for a moment in another aspect, and perhaps more broadly. The terms "business" and "investment," to the ordinary mind, convey quite opposite and contrary meanings. The one connotes the carrying on of some pursuit,—manufacturing, trading or constructing, primarily utilizing the energies of the individual in the production of wealth; the other conveys the idea of placing one's money,—the product or profits of business,—in some form of property so that it may yield a return *of itself;* the one speaks of *activity,*

the other of *inactivity;* the one is primarily *active,* the other primarily *passive.* It may not be easy to define this difference with accuracy, but one feels that it would not be difficult to place any particular case in the class to which it belongs.

The distinction then is not fanciful but real,—between "business" on the one hand, and "investment" on the other; and the term "business" can no more include "investment" than the term "activity" can include "inactivity."

Moreover, he who is engaged in business, although his object, economically speaking, is to obtain the profits of his labor to himself, is, nevertheless, primarily engaged in serving others.

> "Business may be taken to include all provision for the wants of others, which is made in the expectation of payment direct or indirect from those who are to be benefited. It is thus contrasted with the provision for our own wants, which each of us makes for himself, and with those kindly services which are prompted by family affection and the desire to promote the well-being of others."
>
> Marshall, Principles of Economics, page 348 (London, 1891).

On the facts as they appear from the record, it is submitted that the defendant corporation is not doing business within the meaning of the act, and consequently is not taxable under the act.

II.

The Act is Unconstitutional.

If the defendant corporation is within the intent of the Act, the appellant has standing to contest its constitutionality. It is submitted accordingly that the Act is unconstitutional for the reasons hereinafter set out.

1. The Uncertainty and Ambiguity as to the precise Nature and Incidence of the Tax.

An important light is thrown upon the precise nature of this tax by a consideration of the question *who* is taxed. The Statute seems to be clear upon this question, namely, it is the "corporation, joint stock company, or association," and not the individual who holds the stock therein. Much uncertainty has been created by arguments in favor of the constitutionality of this act to the effect in substance that the tax is laid upon the *privilege of doing business in the corporate form.*

In the case of *Nicol* v. *Ames*, 173 U. S. 509, a stamp tax of one cent per $100 was laid by Congress upon sales of products or merchandise at any exchange or board of trade, the act requiring a memorandum of the sale to be made and delivered by the seller to the buyer with the necessary stamp affixed thereto. A penalty was imposed for violation of the act. The Court upheld the act as an excise tax upon the privilege of the use of the exchange or board of trade and held that the tax might be measured by the value of the property sold, that being a fair measure of the extent to which the privilege was exercised.

The privilege of doing business in the corporate form is not a privilege which is enjoyed by the *corporation* as such; if it were, this tax would be merely a tax on the corporation because it *exists*,—or in other words, a *franchise* or capitation tax; it is primarily not even a privilege which is enjoyed by the *shareholders;* it is a privilege enjoyed by the persons who direct the activities of corporations and actually carry on their business. It enables them to direct such business by means of the use of wealth which is contributed by the shareholders and, as a general rule, the individual returns of the persons directing such activities are received primarily in the form of salaries.

The debates in Congress show that it was the intention of this Act to impose the tax upon accumulated wealth, and that Congress regarded the shareholders of a corporation as investors and not as actors in the doing or carrying on of the business. Senator Root said:—

> "It is not just, and it is universally recognized by the people who have thought carefully and deeply upon this subject that it is unjust, to take a man who is in the enjoyment of a few years of earning capacity—it may be ten or twenty or thirty—when he is turning into money his brains and his nerves and his life; when, if he is wise, if he has a grain of common sense, if he possesses those qualities that we all of us wish to foster and encourage among our people, he will be laying up a portion of that income against the days of his age and his illness and the wants of his family, and impose upon that income, the part that he lives on and the part that he is accumulating as capital. the same imposition that is put upon the income that his neighbor gets from invested securities that last forever. Now, I say the latest and the most considerate treatment of the subject of income tax makes a careful distinction between those two.

> Mr. President, it has so happened that in the development of the business of the United States the natural laws of trade have been making the distinction for us, and they have put the greater part of the accumulated wealth of the country into the hands of corporations, so that when we tax them we are imposing the tax upon the accumulated income and relieving the earnings of the men who are gaining a subsistence for their old age and for their families after them" (Vol. 44, Congressional Record, p. 4068).

The corporation, then, enters the field of business with no especial privilege or advantage to assist it in the struggle of competition against those who are already in the same field of business. The shareholder, as such, on the other hand, is not himself engaged in business. He is the investor who has loaned his wealth to the corporation, to be used by those who direct its activities, and the return upon his stock in the form of dividends is his income from a *personal property investment.*

On the one hand, then, the corporation itself enjoys no special privilege; on the other hand, the shareholder is not engaged in business, but is merely an investor whose income cannot be subjected to a direct tax without apportionment, under the authority of the *Pollock* case. In spite of this, the tax is laid by this Act upon the corporation and its burden is felt by the shareholder in the decrease in dividends.

In view of these facts, it is respectfully submitted—

First. That the tax is laid upon the corporation itself, as such, and not upon the persons who compose it.

Second. That as the tax is laid upon the corporation it cannot be considered as a tax upon the "privilege of doing business in the corporate form." It must be a tax either upon the exercise of its franchise or else upon

the carrying on or doing of its business. It cannot by any specious argument be said to involve the privilege which is enjoyed by those actively interested in the Company.

The Court is faced with these alternatives:—

> (1) If it goes behind the corporation in order to justify the tax as laid upon a privilege enjoyed by persons going to make up the corporation, the tax becomes a tax on the income of personal property invested.
>
> (2) If the Court regards the corporation itself as the unit, there is no special privilege to be taxed and it becomes clear that the tax is laid upon the carrying on or doing business, or upon the exercise of the franchise, and not upon any carefully prepared combination of (1) doing business and (2) privilege of limited liability of shareholders. In such case, the classification in the Act is unreasonable, because corporations only are taxed, all others being exempt.

The debates in Congress show the greatest unwillingness on the part of the sponsors of this Act to disclose the precise thing upon which the excise was laid, and, though firmly pressed for an exact statement, they declined to say more than that the Act intended a tax upon the right or privilege of corporations to transact business and that it might include something more (Vol. 44, Congressional Record, p. 4088, discussion between Senator Brandegee and Senator Root).

The debates show many efforts to have the Act define the precise thing upon which the excise was laid, as, for example, whether upon the corporate franchise or upon the exercise of the corporate franchise, or upon the doing or carrying on of business. These efforts were resisted. The Congress appreciated that the constitutionality of the Act rested not only upon the deter-

mination but also upon the precise definition of the thing upon which the excise was to be placed.

There were two difficulties; *First*, the selection of the privilege upon which the excise was to be laid, and, *second*, the classification of the persons exercising the privilege, if all persons exercising it were not to be taxed.

The difficulty in selecting the corporate franchise or the exercise of the corporate franchise as the special privilege arose from the principle laid down in *California* v. *Central Pacific Railroad Company*.

The special privilege of doing or carrying on business might be made the subject of an excise tax. If the latter were selected as the privilege, the classification which limited the tax only to corporations would be dangerous.

An amalgamation of the two ideas, (1) "of persons organized in corporate form," (2) "carrying on or doing business," was made in the hope that by regarding the individuals as the unit for purposes of classification and the corporation doing or carrying on business as the unit for the purposes of the tax there might be an escape from these difficulties and from the inevitable unconstitutionality of the act which would result if either the shareholders or the corporation were regarded as the unit for both purposes.

In order to sustain the constitutionality of this act, the Court must regard the shareholders (who are not doing business) as the unit for purposes of classification, and the corporation (which among all persons doing business cannot be made a class) as the unit which exercises the privilege subject to the tax.

A complete reading of the debates can only lead to the conclusion that efforts were largely devoted to the selection and maintenance of ambiguous language, in order that in the penumbra of the ambiguity, the presumption of constitutionality in the legislative Act, might prevail.

2. The Tax is in Reality an Income Tax.

The tax is nominally laid upon every corporation, etc., "with respect to the carrying on or doing business by such corporation, etc.," and is stated to be "equivalent to one per cent. upon the entire net income over and above $5,000.00 received by it from all sources during such year exclusive of amounts received by it as dividends upon stock of other corporations, etc., subject to the tax hereby imposed."

Elaborate provisions are contained in the Act relative to the method of determining the amount of receipts and expenditures and of arriving at the net income which is deemed to be taxable.

It is true, on the one hand, that the Court will undoubtedly pay a very high degree of deference to the language whereby Congress has stated this tax to be "a special excise tax .... equivalent to one per centum upon the entire net income etc.," but as was said by Mr. Justice Holmes in *Galveston, Harrisburg, etc., Railway Company* v. *Texas*, 210 U. S. 217, 227:—

> "Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

In that case a Statute of Texas imposed an annual tax upon railroad corporations, "equal to one per centum of its gross receipts if such line of railroad lies wholly within the state." The lines of the road concerned did lie wholly in the State of Texas, but they connected with other lines, and certain portions of their gross receipts were derived from the carriage of passengers and freight

coming from or destined to points without the State. The Court held that the tax was not a tax on property measured by the amount of the gross income, but was in reality a tax upon the income itself and was, therefore, unconstitutional, and that the act was not helped by the use of the words "equal to."

This looking at the real effect of a tax was emphasized in *Fairbank* v. *United States*, 181 U. S. 283, where it was held that a stamp tax on a foreign bill of lading was in substance and effect on the articles included in the bill of lading and was, therefore, a tax or duty on exports within the prohibition of the Constitution.

And in *Ludwig* v. *Western Union Telegraph Co.*, decided February 21, 1910, this Court declared unconstitutional a statute of Arkansas which required foreign corporations, as a condition of continuing business in that State, to pay a fee based on their total capital stock for filing articles of incorporation in the State. The Court held that this was in substance imposing a burden on interstate commerce, and also taxing property beyond the jurisdiction of the State.

As has been shown heretofore in this brief, the Act nowhere states specifically upon what the tax is levied; the answer to that question is left entirely to inference. In view of this fact it is especially significant to notice that although it is described as a tax "with respect to the carrying on or doing business," it is not measured by the income of the Company from the business alone, but by the income from *all sources*. It is not unnatural to suppose, in the absence of some other convincing feature of the Act, that as the amount of the tax is determined by the net income from all sources, the tax is in reality laid *upon* that net income. It is true that a tax may in fact be laid upon some property or privilege in proportion to the value of some other

property or privilege, without being a tax upon the latter. The theory, however, in any such case must be that the thing which is taken as the standard or measure by which the amount of the tax is determined is a fair standard or measure of the value of the thing upon which the tax is technically laid, and if such standard does not reasonably and fairly measure the value of the thing taxed, that fact is a strong argument that the tax is not in fact laid upon the thing upon which it is said to be laid. The fair question, then, in the present case, is, is the total net income merely a convenient measure of the value of the business done or is it so far unrelated to the business that it is not a fair measure of the value of the business.

It would have been natural, in this case, if the tax were intended in reality as a tax upon the carrying on or doing business, to have made it depend, as to its amount, upon the income derived *from the doing of business* and not upon the income from *all sources*. This was done in the Act which was before the Court in the *Spreckels* case, and the Court in the computation of the income subject to tax in that case, excluded the returns from invested funds not connected with the business.

If a corporation were to carry on its business at an actual loss, yet under this act, if its invested funds in real estate or personal property, having nothing to do with the business conducted, were sufficient to make this total net income over $5,000.00, it would be subject to this tax. The act also provides that as to foreign corporations, the tax shall be based upon the net income "from business transacted and capital invested within the United States, etc."

If the tax were in fact upon the franchise received from the State, it might not be unnatural to gauge the amount of the tax as has been done in this act. If

intended as a special excise tax upon the carrying on or doing business or upon the exercise of the corporate franchise in the carrying on or doing business, it is submitted that in either case it is unnatural to measure the amount of the tax by the income from *all sources* expressly including in the case of foreign corporations income from "capital invested," thereby indicating with clearness the intention to include income from capital invested as to domestic corporations.

The net income from all sources is not a fair standard or measure either of the value of the business carried on or of the value of the exercise of the corporate franchise. The income from real estate and invested personal property is entirely independent of the franchise or its exercise. The fact that the investment is held by a corporation adds nothing to its value, either to the corporation or the shareholders. When, therefore, such income is included in the measure of the amount of the tax, either as a tax upon the business or as a tax upon the corporate privilege in any aspect, there is a clear departure from the natural standard of measuring such value. It is submitted that in view of this apparently deliberate departure from the obvious method of measuring such value, the tax loses its character as "a special excise with respect to the carrying on or doing business, etc.," and becomes in fact and substance a tax upon income, and is unconstitutional under the authority of the *Pollock* case.

3. If not an Income Tax generally, still it is as to the Defendant Company a Direct Tax upon its Income from Real and Personal Estate.

Attention has been called heretofore to the fact that the sole income of the defendant corporation is derived from its real estate and its accumulated profits. It would seem, therefore, that if the care and management of real estate to the extent necessary in the proper oversight of its investments and so far only as is incidental thereto, is to be deemed the carrying on or doing business within this act, it would follow that the defendant corporation is subjected to a tax differing in name only from that which was declared unconstitutional in the *Pollock* case.

Mr. Justice White, in his dissenting opinion in the *Pollock* case, called express attention to the fact that the tax in that case affected income from real estate only in the respect that such rentals were included in the aggregate income from which expenses for insurance, repairs, losses in business, etc., were to be deducted in order to ascertain the taxable net income (pp. 644–645). This fact, *viz.*, that the income from real estate was only one element in the computation, was apparently one of the principal difficulties which caused Mr. Justice White to differ from the opinion of the Court, but notwithstanding the fact that the income from real estate was affected only in this manner, the majority of the Court held the tax unconstitutional. *The fact that it was included in the computation was sufficient.*

In the present case, as regards the defendant corporation, the tax lies directly upon the rentals received from

its real estate and the income from its accumulated profits. The tax on both these elements was held in the *Pollock* case to be a direct tax, and calling it a tax on doing the business of investing money in real and personal estate does not change the substance of the tax. It remains a tax directly upon the income of the defendant from its funds invested in real estate and in personal property, and is as much a direct tax upon such income as if it were laid thereon in name as well as in substance.

4. The Act is Invalid as laying a Burden upon an Instrumentality of the State.

It would appear also that this Act is open to the objection that the tax imposed is a burden upon the instrumentalities of the State within that principle of constitutional law which forbids either the Federal or State government from laying any burden upon the instrumentality of the other.

The defendant corporation, having been organized under a special law, is, in a special and peculiar sense, an instrument of the State in performing the duties which its charter imposed. The performance of such duties is pursuant to a special contract with the State which is not subject to alteration, amendment or abrogation.

If the tax is a tax upon income it is unconstitutional under the principles hereinbefore referred to. If it is regarded as a tax on the franchise granted by the State, or as a tax on the exercise of the franchise, or as a tax on the doing of business, it is submitted that it equally lays a burden upon the instrumentalities of the State.

A review of the authorities, we believe, will show

that any burden placed by either government upon the *exercise or operation* of agencies or instrumentalities employed by the other for the accomplishment of purposes within its exclusive sphere, is as objectionable from this view point as if laid upon the franchise or power of the State itself. The principle of the cases is that neither government is to be hampered in any manner in the conduct of functions which properly belong to it by any action of the other.

In the *Pollock* case, Mr. Justice White, in his dissenting opinion, discussing the case of *Scholey* v. *Rew*, 23 Wallace 331, where a tax was put upon the right to inherit real estate and where the tax was sustained as an indirect tax, said (p. 649):—

> "That decision cannot be explained away by saying that the Court overlooked the fact that Congress had no power to tax the devolution of real estate and treated it as a tax on such devolution."

He regarded it not as a case of tax upon the right to inherit, which he said "Congress had no power to regulate or control," but apparently as a tax on an interest or right in the property itself, and he regarded that case, therefore, as being conclusive to the effect that as that tax was not a direct tax upon the real estate, so the tax in the *Pollock* case should not be considered as a direct tax.

In *Knowlton* v. *Moore*, a further distinction appears to have been taken and the inheritance tax was there sustained as being not a tax upon the power of the State to regulate successions, but as a tax upon a recipient taking property in accordance with those regulations after they have been made. Mr. Justice White delivering the opinion of the Court said (p. 58):—

"The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several States, therefore Congress is without authority to tax the transmission or receipt of property by death. . . . But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."

This case of *Knowlton* v. *Moore* is referred to as sustaining the proposition that although the Federal government cannot tax a franchise or right granted by the State, it can, nevertheless, impose a tax upon the *exercise* of that right by the recipients of the grant.

It is submitted, however, that the necessity for the distinction which is taken in *Knowlton* v. *Moore*, and the real ground for the statement that the power of the State to regulate successions cannot be taxed by the Federal government, is a technical one, namely, that the rights of sovereignty of the State are outside of the power of the Federal government, and that to tax the power of the State to regulate successions, would be inconsistent with the theory of State sovereignty as to matters exclusively within State control.

It is to be noted that, in *Knowlton* v. *Moore*, whether the tax be regarded as assessed upon the *power of the State* to regulate successions or as upon the *right of the recipient* to take, in accordance with the regulations, the functions of the State, so far as they concerned the carrying on of the government and so far as they concerned the

activities of the State in the exercise of its powers for the general welfare of its people or for the carrying on of its legitimate enterprises, were in no way impeded, and that in either aspect of that tax, it imposed no burden upon proper action of the State.

If the present Act lays the tax upon the franchise itself, or in other words upon the power of the State to grant franchises, it falls within the prohibition in *Knowlton* v. *Moore*, against interference with the power of the State. There is, however, in this case, also a *direct burden and impediment* on the governmental activity of the State, and it would seem evident that whatever view be taken of the precise incidence of the tax, this direct burden and impediment still exists.

If we consider for a moment some State function which is recognized as governmental and as being, therefore, beyond the power of the Federal government to tax, such, for example, as the right of the State or any department of the State to borrow money, it must be admitted that it makes no difference so far as impeding the functions of the State is concerned, whether the tax is purported to be laid upon the power of the State to borrow money, or upon the securities which are issued by the State for that purpose, or upon the income received by the holder of those securities. In any of these cases the functions and instrumentalities of the State are clearly beyond the reach of Federal taxation, directly or indirectly. The Federal government can tax neither the power of the State to borrow nor the exercise of that power, nor the receipt by individuals of the price which the State pays for the loan. The tax is a burden upon the proper activities of the State, and is, therefore, unwarranted, whether laid directly or indirectly.

It is submitted that in the present case there can be no distinction whether the tax is regarded as laid upon

the corporate franchise granted by the State or upon the exercise of that franchise or upon the doing of business (which is exercising the franchise). In any of these aspects the tax is a burden upon the franchise, and upon the ability of the State to act by such means.

The question remaining, therefore, is whether such franchise, or the specific activity if undertaken by the State itself, or the end which the State may have in view in the granting of such franchise, can properly be subjected to the Federal tax. If the particular object of the State in granting any particular franchise or the particular enterprise which is being fostered by the State in this manner is of that class of State activity which is free from Federal control, the tax cannot be laid.

In the case of *California* v. *Central Pacific Railroad Company*, 127 U. S. 1, the defendant was a California corporation which received certain valuable franchises from Congress in connection with the undertaking which was entered into by the United States relative to the construction of a through line of railroad from the Missouri River to the Pacific Ocean. It had become to all intents and purposes a Federal corporation. The State of California undertook to levy a tax upon all the property and franchises of the Company. The Court said (per Bradley, J., pp. 40–41):—

> "Assuming then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly

tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. . . . A franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* v. *Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us al-

most absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *The Bank of the United States*, 9 Wheat. 738; and *Brown* v. *Maryland*, 12 Wheat. 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson* v. *Pacific Railroad*, 9 Wall. 579, and *Railroad Company* v. *Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations. 18 Wall. 35, 37."

In *Railroad Company* v. *Peniston*, 18 Wallace, 5, it was held that a state could impose a tax upon the real and personal property, as distinguished from the franchise, of the Union Pacific Railroad Company, a Federal corporation.

The Court said, speaking by Mr. Justice Strong (p. 36):

"It is therefore manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves

> them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers. "

It would appear, then, that the granting of a franchise is an attribute of sovereignty, and that a state may not in any manner obstruct the operation of any franchise granted by the Federal government.

The rule is reciprocal. The states, also, within their reserved powers are no less sovereign than is the Federal government within its granted powers and the same reasons would seem to apply for denying to the Federal government the right to obstruct or impair the operation of franchises granted by the state as apply for denying the right of the state to obstruct or hinder franchises granted by the Federal government. The rule in each case rests upon the principle of *the absolute and independent sovereignties of the Federal and State governments within their respective spheres of action.*

In *Collector* v. *Day*, 11 Wallace, 113, the decision went only to the point that it was not competent for Congress to impose a tax upon the salary of a judicial officer of the State. After discussing the cases of *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Weston* v. *Charleston*, 2 Peters, 449, the Court referred to the case of *Dobbins* v. *Commissioners of Erie*, 16 Peters, 435, which determined that the states were prohibited from taxing the salary or emoluments of an officer of the Federal Government, and said (p. 124):

> "We shall now proceed to show that, upon the same construction of that instrument and *for like reasons*, that government is prohibited from taxing the salary of the judicial officer of a State." (Italics ours.)

and further (pages 124, 127):

> "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States. . . . And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other."

In *Fifield* v. *Close*, 15 Mich. 505, holding that so much of the Federal Internal Revenue law as required process in state Courts to be stamped as a condition of the validity of legal proceedings, was unconstitutional, the Court bases its reasoning squarely upon the principle of the absolute sovereignty of the State within its proper sphere. The following language is especially significant (p. 508):—

> "The same supreme power which established the departments of the general government, determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution which limits them, and independent of other agencies, except as thereby made

> dependent. There is nothing in the constitution which can be made to admit of any interference by Congress with the secure existence of any state authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the national legislature as if the interference were direct and extreme."

See also:

> *Smith* v. *Short*, 40 Ala. 385;
> *Warren* v. *Paul*, 22 Ind. 276;
> *Jones* v. *Estate of Keep*, 19 Wis. 369;
> *Union Bank* v. *Hill*, 3 Cald. (Tenn.) 325;
> *Moore* v. *Quirk*, 105 Mass. 49.

In *United States* v. *Owens*, 100 Fed. 70, it was held that the bond required by the statute of Missouri to be given by a saloon keeper as one of the conditions of his receiving a license from the State was not subject to taxation by the Federal government.

The Court, after referring to such cases as *Collector* v. *Day*, and *McCulloch* v. *Maryland*, said:

> "These cases, and many others to which reference might be made, establish the principle that the great law of self-preservation, the inherent attribute of sovereignty exempts any and all means or instrumentalities of State governments from Federal taxation in the same way and manner as it exempts any and all means or instrumentalities of the Federal government from State taxation."

The Act of Congress now under discussion makes no exception of corporations which may be organized or whose franchises may be granted by the State for the accomplishment either of those functions which are

strictly necessary to the maintenance and support of the government itself or of those functions which are properly called governmental but which have to do with the development of the resources of the State, the fostering of its internal commerce or the advancement of its industries.

It is true that the Act applies only to corporations "organized for profit." This would exclude, of course, municipal corporations, and it will be argued doubtless that no corporation organized for profit can come within the category of those instrumentalities with which th Federal government is forbidden to interfere.

It is submitted, however, that there is a class of corporations which are organized for profit and which are engaged in business, but which ought at the same time to be regarded as exempt from Federal taxation because they are instrumentalities of the State, which are enfranchised by the State in the exercise of its exclusive governmental powers and with which the Federal government has no right to interfere. We refer especially to public service companies engaged, for instance, in public lighting business or in commerce which is exclusively carried on within the State. Such, for example, are interurban railways which do not form a link in an interstate line. Such public service enterprise inside State lines is as much in the exclusive power of the State as is interstate commerce in the exclusive power of the Federal government. Many of such corporations are endowed with the essentially sovereign power of *eminent domain*. Surely matters of such public import as to be aided by this power are of sufficient moment to the State so that the State should be unhampered in its conduct of them. Such activities by the State cannot properly be called less than "governmental"; and are in many cases of almost immeasurable impor-

tance to the State; and an impediment in their way may be of vastly more importance than a tax upon municipal bonds.

It was held in *California* v. *Central Pacific Railroad Company,* above cited, that a State could not tax a franchise held by a federal corporation which related to interstate commerce and which was granted by Congress as an aid to the development of that commerce. It was held also in *Galveston, Harrisburg, etc., Railway Company* v. *Texas,* 210 U. S. 217, that a tax equal to one per cent. of the gross receipts could not be levied by a State upon a railway situated entirely within the State, because such receipts were made up in part of the income from carriage of through freight and passengers to and from points without the State over connecting lines, this being a restraint upon interstate commerce.

There are many cases, which it is unnecessary to cite here, holding that even an indirect burden on interstate commerce may not be imposed by State laws.

It is submitted particularly upon the authority of the case of *California* v. *Central Pacific Railroad,* that such *intrastate* corporations are without the control of the Federal government in the same manner and to the same extent and for the same identical reasons that *interstate* corporations are without the control of the States. In view of the Galveston case above cited, it would seem clear that it would have made no difference in the California case if the tax had been laid upon the income of the interstate Company instead of directly and in terms upon the franchise. Compare *Philadelphia etc., S.S. Co.* v. *Pennsylvania,* 122 U.S. 326.

It will be contended that this doctrine is overruled or modified by the case of *South Carolina* v. *United States,* 199 U.S. 437, where it was held that the Federal excise tax levied upon dealers in intoxicating liquors should be

applied to the persons authorized by the State of South Carolina, under its dispensary laws, to carry on the sale of liquor within that State. The decision of the majority of the Court upholding the law so applied as being constitutional, appears to rest upon two grounds: *first*, that as the tax was properly levied upon the doing of the business, it made no difference that in this case it was conducted by the State, and that if it were conceded that the State might undertake such private business and be exempt from the tax, the entire internal revenue of the Federal government might by that method be taken away if the State should see fit to engage in those kinds of private business upon which internal revenue taxes were laid; *second*, that the prohibition of Federal interference includes only governmental functions of the State as distinguished from business which is of a private nature, and that if the State engages in the latter, such business is not thereby withdrawn from the taxing power of the Federal government.

The distinction to which we respectfully ask the attention of the Court with respect to this case is that the business in which the State of South Carolina was engaged was a business of a strictly private nature. It was a business, to be sure, which, under the police power, the States have a right to control or even to prohibit, yet it was, nevertheless, a private business which individuals might carry on but which did not conduce in any way to the development of the resources of the State or of its internal commerce or industry. It was not a thing which required as a condition of its prosecution the affirmative sanction and assistance of the State.

It is submitted that the above decision would not have been reached if the industry in question had been one of a public nature having to do with the proper functions of the State in developing its resources and serving its

people, such as the public service companies referred to. Such activities as these, it is submitted with confidence, are activities with the development of which the State is charged. They are matters which rest in the power of the State exclusively, and are of such public nature that Congress has no right nor power to destroy them nor to burden the State in any efforts which it may make for their advancement.

5. If the Tax is upon the Franchise or the Exercise of the Franchise, it is a Direct Tax.

It has been argued that whether the tax is laid in fact upon the corporate franchise or upon the exercise of the franchise or upon doing business, it is invalid as imposing a burden on the instrumentalities of the State. If it be regarded as laid upon either the franchise or the exercise of the franchise we submit that it then has a strong resemblance to a capitation tax and is a direct tax upon the corporation. The corporate franchise is the corporate existence, and the exercise of the franchise is the performance of its natural functions by the body corporate. A tax upon either is direct in the sense that it cannot be shifted by the corporation so that the burden will fall on some one else,—or in other words, it is direct in the economic sense.

It cannot be said, arbitrarily, that with the case of *Hylton* v. *U. S.* and the *Pollock* case, it has been forever settled that no tax can ever be direct in the constitutional sense except the capitation tax, the tax on land, and the tax on the income from land and from invested personalty. This tax, in the present view, is *ejusdem generis* with the capitation tax or with a tax on an individual

entering a business career, imposed because he is a college graduate or because he is redheaded.

6. The Act is Invalid, because of Lack of Equality.

If it should be held that the tax in question is not a direct tax, there remains the objection of the lack of equality.

Whether or not the case of *Knowlton* v. *Moore* is conclusive to the effect that the requirement of uniformity in taxation means only geographical uniformity or whether uniformity contains more than this, such, for example, as that an excise tax on a particular business must be imposed equally upon all who carry on that business, is not believed to be material for two reasons:

(1) The power of taxation, although a necessary power of Government, is not a power to be exercised arbitrarily or unreasonably. It is a power which inherently demands to be exercised on the principles of reasonable equality. This idea of reasonable equality must exist independent of any uniformity provisions. It was assumed by counsel on both sides in the *Pollock* case to be a necessary condition in the grant of the taxing power to Congress. This equality requirement would doubtless permit classification in taxation just as classification is permitted in the exercise of the police power of the States, but such classification in the exercise of the Federal power of taxation, just as in the exercise of the State power of police, should bear reasonable relation to the object to be taxed.

(2) The Fifth Amendment to the Federal Constitution prohibits Congress from depriving any person of

life, liberty or property without due process of law, and from taking private property for public use without just compensation.

The Fourteenth Amendment limiting the powers of the States contains additional language forbidding the denial of the equal protection of the laws. This Fourteenth Amendment, although permitting classification, has been held in numerous cases to require not only in police regulations but also in the tax laws that any classification adopted must be reasonable with respect to the object of the law.

In case of police regulations it is not clear that an unequal application of such a law conflicts with anything in the Fourteenth Amendment, except the equal protection clause.

When we come, however, to taxation laws in which the State takes from the individual who is taxed a certain proportion of his money or property it would seem that, if different persons were burdened unequally, in the absence of some reasonable basis for classification, their rights under the due process clause would also have been impaired, or, in other words, if a certain kind of property is taxed in the hands of one person at one rate and in the hands of another person at a higher rate the latter would have been deprived of property without due process of law and, at least to the extent of the inequality, his property would have been taken for public use without just compensation.

The present act would appear to violate these principles of equality in the following particulars:—

(a) *It Imposes a Tax upon a Business only when done by a Corporation.*

The application of this principle of equality to the case of an excise tax upon the carrying on of any particular business would require that the *same rate of tax* be laid upon the *same business* everywhere throughout the United States. If one rate of tax were imposed in one part of the country and another rate elsewhere, or if one rate were imposed upon the carrying on of a certain business by any particular class of persons, and another rate upon the same business by other classes of persons, the requirement of equality would be clearly violated; so that, for instance, if corporations only were subjected to a tax with respect to the carrying on of the business of sugar refining, while individuals carrying on the same business were exempt, this fundamental principal of equality would require that such tax be declared unconstitutional and void.

Coming, then, to a consideration of the present Act, it is clearly apparent that by whatever name this tax be called, and whatever definition be adopted as to the exact thing upon which this tax technically falls, it involves the evil and injustice of the case just supposed, but many times magnified. Under this act, not only is every corporation carrying on the business of *sugar refining* in the United States subjected to this tax,—all individuals and co-partnerships being free to carry on the same business without tax,—but *the evil is extended to all kinds of business in which corporate enterprise has embarked.* A corporation carrying on any manufacturing business or any financial or commercial business, no matter how small may be the interests involved, is obliged to compete with individuals or others

who may be engaged in the same kind of business, and is at a great disadvantage by reason of the burden so cast upon it.

A striking illustration is found in the case of the defendant Company, It has been shown above that the defendant Company is engaged solely in investing its funds in real estate, managing and caring for the property owned by it and receiving the rentals and income therefrom, and that *it does nothing else*. It also appears from the record (pp. 4, 5), that real estate in the City of Boston is largely held, managed and conducted by so-called real estate trusts, having no franchise from the State, and consisting merely of trusts in which the beneficial interests of the *cestuis que trustent* are represented by certificates. The defendant is thereby brought into direct competition with these real estate trusts, and if the tax be held to apply to the defendant, it is placed at a very great disadvantage thereby.

It is not difficult to multiply instances of this sort in every kind of business or pursuit. In every city and in many of the towns will be found, on the one hand, individuals or co-partnerships, and, on the other hand, small corporations, which have been organized to take advantage of the laws which the States have properly made for the encouragement of industry and commerce, and these are in competition with the others in doing the same kind of business. It is not difficult to foresee the probable effect upon corporate enterprise, particularly in the less thickly settled parts, and so far as the smaller corporations are concerned we may expect that the result will be to discourage those forms of enterprises and developments which the State, by the adoption of corporation laws which it deemed wise, has seen fit to encourage.

It is only necessary to add that no sufficient reason

is apparent for laying the burden of this tax upon corporations, joint stock companies and associations having a capital stock divided into shares, and exempting all others.

(b) *The Exemption of Agricultural and Horticultural Organizations.*

The act exempts agricultural and horticultural organizations. Upon the question of reasonable classification, we may fairly take decided cases bearing upon similar classification in the exercise of the police power of the States.

In *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, the anti-trust statute of Illinois was declared unconstitutional on the ground that in exempting from its operation the producers of agricultural products or live stock, it transgressed the requirement of equality.

No reason is apparent, having relation to the difference between the objects of these two acts, which would make the exclusion of agricultural organizations in the one case a reasonable exclusion, and in the other, an unreasonable one. The Illinois statute in the *Connolly* case was distinctly an anti-trust measure. There is a widespread and prevailing opinion based upon the admissions of those who stood sponsors for this act that one of the objects of the present act is not dissimilar, namely,—Federal control of State corporations.

(c) *The Exemption of Domestic Building and Loan Associations.*

Upon the inequality and lack of reasonable basis in the exemption of these associations, we can do no better than to refer to the language of Mr. Justice Field in his

concurring opinion in the *Pollock* case [157 U. S. at page 598].

The immense amount of property owned by these associations emphasizes the injustice of exempting them from the tax which others engaged "under different names in similar business" are obliged to pay.

7. The Act is Unconstitutional because the Returns are made Public Records.

The clause in the constitution whereby the taxing power is granted to Congress is as follows:—

(Article 1, Section 8, Clause 1) "The Congress shall have power,—

To lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

That portion of the act which provides that the returns made under it "shall constitute public records and be open to inspection as such," would seem to be unnecessary and uncalled for so far as concerns any purpose of raising money or enforcing the making of correct returns or the collection of the tax, and falls outside of the taxing power of Congress.

In *McCray* v. *United States*, 195 U. S. 27, 64, the Court said:—

> "If a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue

but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

It is submitted that the Court cannot say that Congress would have enacted the tax provisions independently of the publicity provisions. and consequently that as the provision making the returns public records is unconstitutional in its character, the whole of Section 38 should be declared unconstitutional.

III.

THE JUDGMENT OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS SHOULD BE REVERSED.

Respectfully submitted,

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Of Counsel.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910

No. 446

OSCAR MITCHELL, APPELLANT,

vs.

CLARK IRON COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED FEBRUARY 17, 1910.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 800.

OSCAR MITCHELL, APPELLANT,

vs.

CLARK IRON COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1910.

1 In the Circuit Court of the United States, District of Minnesota, Fifth Division.

In Equity. No. 734.

OSCAR MITCHELL, Plaintiff,

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN SMITH, EMILY J. CLARK, CHARLES R. SLIGH, and FRANK JEWELL, the Directors of said Clark Iron Company, and FRANK JEWELL, as President, JOHN G. WILLIAMS, as Vice-President, and CHARLES R. SLIGH, as Secretary and Treasurer of said Company, Defendants.

Appearances.

Washburn, Bailey & Mitchell, Duluth, Minnesota, Solicitors for Plaintiff;

John G. Williams, Duluth, Minnesota, Solicitor for the Defendants.

Pleas before the Honorable the Judges of the Circuit Court of the United States of America for the District of Minnesota, Fifth Division, of the January Term of said Court, Held in said District, in the year of our Lord A. D. 1910.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on the 10th day of February, A. D. 1910, came the plaintiff above named, by Washburn, Bailey & Mitchell, his solicitors, and of counsel and filed in the clerk's office of said Court, his bill of complaint in the words and figures following, towit:

2 In the Circuit Court of the United States, District of Minnesota, Fifth Division.

OSCAR MITCHELL, Plaintiff,

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN SMITH, EMILY J. CLARK, CHARLES R. SLIGH, and FRANK JEWELL, the Directors of said Clark Iron Company, and FRANK JEWELL, as President, JOHN G. WILLIAMS, as Vice-President, and CHARLES R. SLIGH, as Secretary and Treasurer of said Company, Defendants.

To the Honorable Judges of the Circuit Court of the United States in and for the District of Minnesota:

Oscar Mitchell of Duluth, Minnesota and a citizen of the State of Minnesota, brings this his bill of complaint against the Clark Iron Company and John G. Williams, William Alden Smith, Emily J. Clark, Charles R. Sligh and Frank Jewell the Directors of said

Clark Iron Company, and Frank Jewell as President, John G. Williams as Vice President and Charles R. Sligh as Secretary and Treasurer of said company, the said Clark Iron Company being a citizen of the State of Minnesota and the said John G. Williams, Vice President and Director of said company being likewise a citizen of the State of Minnesota and both being inhabitants of the District of Minnesota, Fifth Division; the said other defendants being individually citizens of the State of Michigan, and thereupon your orator complains and says:

3 That the plaintiff is and for many years last past has been a citizen of the State of Minnesota and an inhabitant of the District of Minnesota, Fifth Division;

That the defendant Clark Iron Company is a corporation duly created, organized and existing under and by virtue of the provisions of Chapter 28 of the General Laws of Minnesota for the year 1876 and the laws amendatory thereof, and as such corporation, is entitled to own and hold real estate within the said State of Minnesota, and that the principal place of business of said corporation is and for many years has been in the City of Duluth in the Fifth Division of the District of Minnesota, and said corporation has for more than five years last past been a citizen of the State of Minnesota and an inhabitant of the District of Minnesota, Fifth Division.

That the defendant John G. Williams is the Vice President and a director of the said Clark Iron Company and as such has immediate charge and care of the property of the said company hereinafter mentioned; that the said Williams is and for more than ten years last past has been a citizen of the State of Minnesota and an inhabitant of the District of Minnesota, Fifth Division;

That the other defendants herein named are, and for more than one year last past have been, as this plaintiff is informed and believes, residents, citizens and inhabitants of the State of Michigan and of the Western District thereof, and that the defendant Frank Jewell is the president and the defendant Charles R. Sligh is the Secretary and Treasurer of the said defendant Clark Iron Company, and all of the individual defendants herein named are directors of said company.

That the defendant Clark Iron Company is and for several years last past has been the owner of the South half of the Northwest quarter, the West half of the Southwest quarter of Section Twenty-eight (28) in Township Fifty-eight (58) North, of Range Twenty (20) West, and the South half of the Northeast quarter of Section Twenty-three (23) in said Town and Range and the Southeast quarter of the Southwest quarter of Section Thirty-two (32) in said Town and Range, all situated in the County of St. Louis in the State of Minnesota and in the Fifth Division of the District of Minnesota.

That, as this plaintiff is informed and believes, the said defendant Clark Iron Company also has some interest in another tract
4 of forty acres situated in said county, the description of which this plaintiff does not know.

That the defendant Clark Iron Company some years ago made explorations for iron ore upon the lands hereinbefore described, or

ome portion thereof, and caused explorations and developments to e made thereon, resulting in the discovery of large bodies of iron re in said premises, or some portion thereof.

That for more than three years last past the said lands upon which ich deposits of iron ore have been discovered, have been leased to ther parties or corporations for the purpose of carrying on mining perations thereon and taking out and removing iron ore, in consideration of the payment to the said defendant Clark Iron Company f rents or royalties based upon the iron ore so mined and removed, nd that for more than three years last past the said defendant lark Iron Company has not engaged in any business other than to atch over and care for the said lands and receive the rents and oyalties accruing therefrom and distribute the same to its stockolders by means of dividends, except such business as has been ecessary to transact in defending its title to the said premises, in hich the said defendant has incurred large expense, the amount of hich is unknown to this plaintiff, and that the only income the said efendant company has had for more than three years last past as been by way of rent and revenue from the said lands, accruing y and thru the leasing thereof for iron mining purposes by way f rental paid by the lessees on a royalty basis upon the iron ore ined and removed from said lands.

That the said defendant Clark Iron Company has a capital stock f Three Million Dollars represented by shares of One Hundred Dolars each, and this plaintiff is and ever since the 21" day of January 908 has been the owner and holder of Two hundred (200) shares f the capital stock of said corporation.

That the matter in dispute in this cause exceeds the sum of Two Thousand Dollars, exclusive of interest and costs and the same arises nder the Constitution and Laws of the United States.

That at its last preceding session, the Congress of the United States passed an act entitled: "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for Other Purposes," which was approved and signed by the President of he United States on the 5th day of August, 1909 at five minutes after five o'clock P. M. on said day; that in and by Section 38 of said Act of Congress it is provided that every corporation organized for profit and having a capital stock represented by shares, theretofore or thereafter organized under the laws of the United States, or of any state or territory of the United States, and engaged in business in any state or territory of the United States, shall be subject to pay annually a special tax, therein called an excise tax, with respect to the carrying on or doing business by such corporation, equivalent to one per centum upon the entire net income, over and above $5000, received by it from all sources during such year, exclusive of the amounts received by it as dividends upon the stock of other corporations subject to the tax imposed by said act, except certain corporations for religious, charitable, educational and certain other purposes specified in the proviso in said section, within none of which excepted classes does this defendant come.

That in the second subdivision of said Section 38 of said Act it is provided that such net income shall be ascertained by deducting from the gross amount of the income of such corporation received within the year from all sources: 1.—All the ordinary and necessary expenses actually paid within the year out of the income in the maintenance and operation of its business and properties, including all charges, such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; 2.—All losses actually sustained through the year and not compensated for by insurance or otherwise, including a reasonable allowance for depreciation of property, if any. 3.—Interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the paid up capital stock of such corporation. 4.—All sums paid by it within the year for taxes imposed under the authority of the United States or any state or territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein. 5.—All amounts received by it within the year as dividends upon the stock of other corporations, joint stock companies or associations, subject to the tax imposed by said section.

That under the third subdivision of said Act it is provided that from the amount of the net income of each of such corporations, ascertained as above set forth, the sum of $5000 shall be deducted and that said tax shall be computed upon the remainder of
6 said net income of such corporation for the year ending December 31, 1909 and for each current year thereafter.

That it was also provided in said act that on or before the first day of March, 1910 and the first day of March of each year thereafter, a true and accurate return under oath or affirmation of its President, Vice President or other principal officer and its Treasurer or Assistant Treasurer, should be made by each of the corporations subject to the tax imposed by said law to the Collector of Internal Revenue for the district in which such corporation has its principal place of business, which return, it is required by said act, shall set forth: 1.—The total amount of the paid up capital stock of such corporation; 2.—The total amount of the bonded or other indebtedness thereof at the close of the year. 3.—The gross amount of the income of such corporation received during such year from all sources; 4.—The total amount of all the ordinary and necessary expenses actually paid out of the earnings in the maintenance and operation of the business and properties of such corporation, with certain separate statements as therein provided. 5.—The total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property. 6.—The amount of interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the paid up capital stock of such corporation. 7.—The amounts paid by it within the year for taxes imposed under the authority of the United States or any state or territory thereof, stating separately the amounts so paid by it for taxes imposed by the government of any foreign country as a condition to carrying on business therein. 8.—

Net income of such corporation, joint stock company or association after making the deductions in said section authorized.

It was further provided in said Act that all of the returns received by the Collector of Internal Revenue should be by him forthwith transmitted to the Commissioner of Internal Revenue and that the Commissioner of Internal Revenue should make assessments thereon of said tax authorized by said act, and that when such assessment should be made, the said returns, together with any correc-
7 tions thereof which may have been made by the Commissioner, should be filed in the office of the Commissioner of Internal Revenue at Washington and should constitute public records and be open to inspection as such.

That it provided that all such assessments so to be made upon such returns, should be made on or before the first day of June of each successive year, and that the same should be paid before the 30th day of June.

It is further provided in said Act that if any of the corporations shall refuse or neglect to make a return at the time or times specified therein, in each year, or shall render a false or fraudulent return, such corporation shall be liable to a penalty of not less than One Thousand Dollars and not exceeding Ten Thousand Dollars, and that the Commissioner of Internal Revenue in making assessments of such taxes, in case of refusal or neglect on the part of the corporation to make the return or to verify the same as required by the Act, shall add fifty per cent. to such tax, and, further, that in case of failure to pay such tax within the time provided, a penalty of five per centum upon the amount of such tax shall be added thereto and interest at the rate of one per centum per month from the time such taxes become due, to be collected therewith.

That by the terms and provisions of the eighth subdivision of said Section 38 of the said Act, the laws relating to the collection, remission and refund of internal revenue taxes, as far as applicable to and not inconsistent with the provisions of the said section, are extended and made applicable to the tax imposed by said section.

The plaintiff further alleges and says that the enactments of Congress embraced in said Section 38 of said Act, contravenes the Constitution of the United States and invades and violates the rights, under the Constitution, of the plaintiff and all others similarly situated, and the rights of the defendant Clark Iron Company and the tax authorized to be levied and collected under and by virtue of said section is in violation of the plaintiff's constitutional rights and the constitutional rights of the defendant Clark Iron Company and the protection guaranteed to this plaintiff and to all others similarly situated and to the said Clark Iron Company, and all of its stockholders by said Constitution, in this:

1. As an excise tax, the same is obnoxious to the provisions of Section 8 of Article I. of the Constitution of the United States which requires that "all duties, imposts and excises shall be uniform
8 throughout the United States," in that said taxes authorized by said act

(*a*)—Are so unequal and partial as not to be within the taxing power of the United States and to be in violation, not only of said

Section 8 of Article I. of the Constitution, but of the spirit and intent of the whole instrument;

(*b*)—The taxes provided by said enactment are not uniform throughout the United States, either intrinsically as operating on individual tax payers or with respect to any particular class of business, nor are the same geographically uniform with respect to any business or particular class of business, nor with respect to the volume thereof or the rate of taxation thereon.

That among other, such violations of the Constitution are evidenced by the fact that the law purports to levy a tax upon corporations whose net income is more than Five Thousand Dollars and none upon corporations engaged in the same kind of business whose net income is not more than Five Thousand Dollars. That no tax is levied upon the business done by individuals, while citizens engaged in the same business through the means of a corporation chartered by a sovereign state to do such business, are taxed. That the tax laid is not with reference to a particular kind or class of business wherever done throughout the United States, but only on such parts thereof as may be done by a corporation, and hence is not an excise tax applying either intrinsically or geographically uniformly throughout the United States.

2. As a tax upon the net income of corporations, it includes taxes upon the income of both real and personal property and investments therein for income, including income from municipal bonds and other public securities, all of which are direct taxes, (and in so far as the same are upon the income from municipal bonds and public securities, not taxable at all,) and the same are not apportioned in accordance with Section 2 of Article I, of the constitution which, in so far as the same relates to this subject, reads as follows:

"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons,"

and is in violation of the provisions of Section 9 of Article I. of the Constitution, which, so far as relates to this subject, reads:

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken,"

9 and as the said provisions for taxation are so intermingled and inseparable from the other provisions, and the taxes thereby imposed are so intermingled and inseparable from the taxes upon other subjects of taxation, and all together form one entire and indivisible scheme of taxation, the whole of said Act as found in said Section 38 of said Congressional Enactment, is void and unconstitutional.

Furthermore, the tax as an income tax in substance and form, is not equable, being levied upon only a part of the people and is a direct tax and not apportioned in accordance with the provisions of the Constitution.

3. That the same is a tax to be levied, not with respect to the doing of any kind or class of business nor upon the production or consumption or sale of any particular commodity or product, nor upon corporations doing a certain kind of business, nor upon corporations deriving their existence by virtue of any law of the United States, but is laid with respect to the doing of any kind of business when the same is done by and through the means of a corporation, although such corporation be created by the authority of a sovereign state, and is therefore a tax upon the corporate franchises of such corporations and the enjoyment of the franchises granted by a sovereign state, and as such is obnoxious to Article X. of the Constitution which provides:

"The powers not delegated to the states by the United States, nor prohibited by it to the states, are reserved to the states respectivly, or to the people."

That by said act it is attempted to levy a tax or penalty upon a corporate franchise and the exercise of a corporate franchise granted by a sovereign state in the exercise of the sovereign powers reserved to it under the Federal Constitution, and to prohibit the enjoyment of such right and franchise, unless the corporation holding the same shall submit and file statements and reports, not required by the laws of the state or by its charter, with respect to its business, and pay a tax to the Federal Government, not required by the state, as a condition to the exercise of the franchise granted to it by a sovereign state in pursuance of the powers reserved to such state under the Constitution of the United States; and there exists by reason of the said Constitution and particularly of said Article X. of the amendments thereto, no power in the Federal Government to tax, destroy or place any penalty or condition upon the enjoyment of a corporate franchise granted by a sovereign state, and to do so is to infringe and destroy such power.

4. That said act provides enormous and excessive penalties for failure to make and file returns to the end that an assessment of such tax may be made, in that it provides for a penalty therefor of not less than One Thousand Dollars, and which may be as much as Ten Thousand Dollars, and for an additional fifty per centum of the amount of such tax for a failure to make and file the returns and report required by such act, and such act is therefore a denial to such corporations, including the defendant Clark Iron Company, of the equal protection of the law, by subjecting such corporations to excessive and ruinous penalties if they exercise their right to contest the validity of such law in the courts, and for such reasons, as well as because of all of the matters set forth in the preceding paragraphs, said law is obnoxious to the Constitution of the United States and to the whole thereof, and particularly to Section 1 of Article XIV of the Amendments to said Constitution which provides that "there shall not be denied to any person equal protection of the laws," and to Article V. of the Amendments to said Constitution which, among other things, provides that, "No person shall be deprived of life, liberty or property wihout due process of law," and both the levy and enactment of such taxation and the infliction of such penalties and the invasion of the private rights and business

and books of such corporations, including the defendant corporatio and the coercion or intended coercion by reason thereof of such c porations, including the defendant corporation, into compliar therewith by reason of such penalties, without contesting such la operates to deprive such corporations, including the defendant c poration and others similarly situated, of their property without d process of law and is therefore obnoxious to Article VIII. of t Amendments to the Constitution of the United States which provi that: "Excessive bail shall not be required of nor excessive fines i posed upon nor cruel nor unusual punishments inflicted," and t plaintiff alleges that upon all of the grounds hereinbefore set for said Section 38 of the said Act of Congress of August 5", 1909, is u constitutional, inoperative and void and the taxes therein directed be levied and assessed and collected and the penalties therein p vided to be enforced for the violation of said act, are without lawf authority and void.

11 That the Commissioner of Internal Revenue, Mr. Roy E. Cabell of Washington, D. C., with the approval of the S retary of the Interior, has formulated and promulgated regulatio known as "Regulations No. 31 United States Internal Revenue," f the guidance of collectors of internal revenue throughout the Unit States, and for the information of corporations in making retur under said act, making classification of corporations and containi various instructions for the enforcement of said law, and has del ered the same in large numbers to the Collector of Internal Reven for the District of Minnesota.

That the Collector of Internal Revenue for the District of Minn sota obtained the names of corporations existing in said distri among others the name of the defendant corporation, the Clark Ir Company, and has sent out to each of them, including the said c fendant company, a copy of said Regulations No. 31, accompani by blank forms of returns and thereby demanded of the defenda corporation and of a multitude of other corporations, to make o and verify such returns, pursuant to said enactment and pursua to said regulations, showing numerous things and matters pertai ing to the affairs of such corporation, including all of the matte required by said law to be shown and exhibited in such returns, a more, and requiring the same to be filed with the said Collector or before March first next, a copy of which regulations so sent o and described as aforesaid, and as delivered to the said defenda Clark Iron Company, is hereto attached Marked "Exhibit A" a made a part of this bill of complaint; that one copy of the form return sent by the Collector to the said defendant Clark Iron Co pany, addressed to it at its office in Duluth, Minnesota, being des nated as "Form 638" is hereto attached, marked "Exhibit B" a made a part of this bill of complaint.

That this suit is not a collusive one to confer on a court of t United States jurisdiction of a case of which it would not otherwi have cognizance.

That this plaintiff, as a stockholder of the said defendant Cla Iron Company, has demanded of the said company that it do n

make out or file such returns with the Collector of Internal Revenue and that it shall take such steps as may be necessary to resist the levy, assessment and payment of such tax, but that the said defendant, acting through its officers and directors, has, as this plaintiff is informed and believes, determined to make and file such re-
12 turns as required by said law, in order to avoid the risk of the penalties provided therein for failure so to do, and that unless restrained by the court, the said defendant corporation, acting through its officers and directors, will not only make out and file such return, but will also pay the tax that will be assessed thereon by the Commissioner of Internal Revenue after such return shall have been made and filed and such assessment is made by him thereon, in order to avoid the risks and penalties for failure to make such payment and to comply with such law.

Upon information and belief, that the net income of the defendant Clark Iron Company for the year 1909 greatly exceeded the sum of Five Thousand Dollars and a true return of its income and revenues for said year, after the disbursements and various allowances provided in said act to be shown, will show a net income greatly exceeding the sum of five thousand dollars and render said corporation subject to be taxed under said enactment.

That the payment of such taxes will diminish the assets of the said Clark Iron Company, and lessen the dividends and the value of the shares therein;

That the voluntary compliance by the said defendant company, through its officers, in the making and filing of said return, will expose to public examination and make a public record of affairs and transactions of said defendant company, and that if such report be not made, or if made and the same is not satisfactory to the Commissioner of Internal Revenue or to the Collector of Internal Revenue for the said district of Minnesota, unless this defendant company and its officers be enjoined by the court from making such report, further reports and returns will be demanded and will be made, examinations of books and records will be made and all of the affairs of said defendant company examined into in order that the said Collector or Commissioner, with the aid of such examination, books and records, may make out and assess such amount of tax as the commissioner concludes the said defendant company is liable to pay under said Section 38 of said act, and, unless restrained by this court, the defendant corporation, acting through its said officers and directors, will make payment of such taxes, and unless said defendant company abstains from such payment by reason of the injunction of this court, said revenue officers will enforce such collection with the penalties thereon, provided by said Section 38, by seizure, distraint or otherwise, as provided in Sections 3172 to 3231 inclusive of the Revised Statutes of the United States for the collection and enforcement of internal revenue taxes.

13 That the voluntary making and filing of the returns required by said Section 38, of the property and affairs of the said defendant company, will result in making a public record thereof and be an exposition of the same and of all of the internal

affairs of the said defendant company and will subject it and the plaintiff as a stockholder therein, and all others similarly situated, to risk and loss and annoyance, and result in a violation of the right of all of the stockholders of the said corporation to have the affairs of the said corporation, its receipts and disbursements maintained with that secrecy which any individual and any private corporation has a right to have maintained inviolate with respect to its affairs; and the filing of such return will result, not only in the exposition to public examin-tion of the condition of the said corporation and of its receipts and disbursements and of its transactions, but will subject this plaintiff and other stockholders similarly situated, to having the affairs, both of said corporation and of their interests as stockholders therein, made a matter of public record and thereby violate the right of this plaintiff and of all others similarly situated, to have the said matters as private affairs kept inviolate and not made public, all of which will result in irreparable injury to this plaintiff for which no adequate remedy can be had at law, and, furthermore, that voluntary compliance with the provisions of said law in the making of such returns and the payment of such tax as may be levied thereon, will expose the said defendant company to a multiplicity of suits, not only to the injury and damage of the said defendant company, but to the injury and damage of this plaintiff and all others similarly situated, and unless this court shall by its injunction or injunctional order prevent the actions of the said defendant company hereinbefore set forth, from being done and performed by the said defendant company and protect the said defendant company in its obedience to such order or injunction as the court may issue, this plaintiff will be deprived of his property without due process of law and the property of said defendant corporation will be taken for public use without due process of law, without just compensation and without the authority of any valid law;

All of which actings and doings, which will be done unless restrained by this court, are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

To the end, therefore, that this plaintiff and others similarly situated may have that relief which can only be obtained in a court of equity and that the defendants may answer the premises,
14 but not upon oath or affirmation the benefit whereof is expressly waived by this plaintiff.

Wherefore Your orator prays that it be adjudged and decreed that the said provisions of said law contained in Section 38 of the said Act of Congress of August 5", 1909 and known as the "Corporation Tax Law," are unconstitutional, null and void, and that the said defendant Clark Iron Company and the other defendants the officers and directors thereof, be restrained from voluntarily complying with the provisions of said act and from making the lists, returns and statements provided in said act to be made and from paying the tax or any tax upon the net income of said corporation or any part thereof, under the provisions of said act, assessed or which may be assessed or purported to be assessed by the Commissioner of In-

ternal Revenue under the provisions of said act, and your orator further prays that the court do now grant him a temporary writ of injunction so restraining the said defendant corporation and its officers and directors, pending the final determination of this cause, and until the further order and decree of this court in the premises, and for such other and further relief as the nature of this case may require and to your honors may seem meet.

To the end that your orator may obtain the relief to which he is justly entitled in the premises, he now prays the court to grant him due process of subpœna directed to the said defendants requiring and commanding each of them to appear herein and answer but not under oath (the same having been expressly waived) the several allegations in this your orator's bill contained and further to stand to, perform and abide such further order, direction and decree therein as to this honorable court may seem meet and as shall seem agreeable to equity and good conscience.

Dated, January 31st, 1910.

OSCAR MITCHELL, *Plaintiff.*
WASHBURN, BAILEY & MITCHELL,
Solicitors and of Counsel for Plaintiff,
700-9 *Lonsdale Bldg., Duluth, Minnesota.*

15 UNITED STATES OF AMERICA,
District of Minnesota, County of St. Louis, ss:

On this 31st day of January, A. D. 1910, before me personally appeared Oscar Mitchell, the plaintiff in the above entitled action, who made solemn oath that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[NOTARIAL SEAL.] F. M. EMANUELSON,
Notary Public, St. Louis County, Minnesota.

My commission expires Mar. 11, 1912.

Endorsed: Bill of Complaint. Filed February 10th, 1910, Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

16 PLAINTIFF'S EXHIBIT A.

Regulations No. 31, United States Internal Revenue.

Law and Regulations Relative to Excise Tax on Corporations, Joint Stock Companies, Associations, and Insurance Companies, Imposed by Authority of Section 38, Act of August 5, 1909.

December 3, 1909.

17 Regulations Relating to the Assessment and Collection of the Special Excise Tax Imposed by Section 38 of the Act of August 5, 1909, on Corporations, Joint Stock Companies, Associations, and Insurance Companies.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER INTERNAL REVENUE,
WASHINGTON, D. C., *December* 3, 1909.

Section 38 of the act of August 5, 1909, is as follows:

SEC. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Teritories, Alaska, and the District of Columbia during such year exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious charitable, or educational purposes, no part of the net in-

come of which inures to the benefit of any private stockholder or individual.

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of
18 property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carry on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: *Provided,* That in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States and its Territories, Alaska, and the District of Columbia, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States or its Territories, Alaska, or the District of Columbia not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness, not exceeding the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United

States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) the sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, and insurance companies, subject to the tax hereby imposed. In the case of assessment insurance companies the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guaranty or reserve funds shall be treated as being payments required by law to reserve funds.

Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing
19 paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth (first) the total amount of the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year; (second) the total amount of the bonded and other indebtedness of such corporation, joint stock company or association, or insurance company at the close of the year; (third) the gross amount of the income of such corporation, joint stock company or association, or insurance company received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia; also the amount received by such corporation, joint stock company or association, or insurance company within the year by way of dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by this section; (fourth) the total amount of all the ordinary and necessary expenses actually paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint stock company or association, or insurance company within the year, stating sep-

ately all charges such as rentals or franchise payments required to made as a condition to the continued use or possession of prop-ty, and if organized under the laws of a foreign country the nount so paid in the maintenance and operation of its business thin the United States and its Territories, Alaska, and the Dis-ct of Columbia; (fifth) the total amount of all losses actually stained during the year and not compensated by insurance or other-se, stating separately any amounts allowed for depreciation of prop-ty, and in the case of insurance companies the sums other than vidends, paid within the year on policy and annuity contracts and e net addition, if any, required by law to be made within the year reserve funds; and in the case of a corporation, joint stock com-ny or association, or insurance company, organized under the laws a foreign country, all losses actually sustained by it during the year business conducted by it within the United States or its Territories, Alaska, and the District of Columbia, not compensated by in-surance or otherwise, stating separately any amounts allowed for depreciation of property, and in the case of insurance com-nies the sums other than dividends, paid within the year on policy d annuity contracts and the net addition, if any, required by law be made within the year to reserve fund; (sixth) the amount of terest actually paid within the year on its bonded or other indebt-ness to an amount of such bonded and other indebtedness not ex-eding the paid-up capital stock of such corporation, joint stock mpany or association, or insurance company, outstanding at the se of the year, and in the case of a bank, banking association, or ust company, stating separately all interest paid by it within the ar on deposits; or in case of a corporation, joint stock company or ociation, or insurance company, organized under the laws of a for-gn country, interest so paid on its bonded or other indebtedness to amount of such bonded and other indebtedness not exceeding the portion of its paid-up capital stock outstanding at the close of the ar, which the gross amount of its income for the year from busi-ss transacted and capital invested within the United States and y of its Territories, Alaska, and the District of Columbia, bears to e gross amount of its income derived from all sources within and thout the United States; (seventh) the amount paid by it within e year for taxes imposed under the authority of the United States any State or Territory thereof, and separately the amount so paid it for taxes imposed by the government of any foreign country as ondition to carrying on business therein; (eighth) the net income such corporation, joint stock company or association, or insurance npany, after making the deductions in this section authorized. l such returns shall as received be transmitted forthwith by the llector to the Commissioner of Internal Revenue.

Fourth. Whenever evidence shall be produced before the Com-ssioner of Internal Revenue which in the opinion of the commis-ner justifies the belief that the return made by any corporation, nt stock company or association, or insurance company is incor-t, or whenever any collector shall report to the Commissioner of ternal Revenue that any corporation, joint stock company or asso-

ciation, or insurance company has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return, such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the
21 production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed, unless the refusal, neglect, or falsity is discovered after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by

the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

22 Eighth. If any of the corporations, joint stock companies or associations, or insurance companies aforesaid, shall refuse or neglect to make a return at the time or times hereinafter specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return, who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

All laws relating to the collection, remission, and return of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

ARTICLE 1.

The attention of collectors and others is specially called to the fact that the tax imposed by this section of the law applies to all corpora-

tions, joint-stock companies, associations, or insurance companies described (except those specifically exempted), without reference to the kind of business carried on, and that the tax is to be computed upon the net income of such corporations, joint-stock companies, associations, and insurance companies, which shall be calculated by subtracting from the gross income received from all sources during the year certain deductions specifically set forth in the statute.

Every corporation, joint-stock company, association, or insurance company not specifically enumerated as exempt shall make the return required by law, whether it may have net income liable to tax or not.

In the case of corporations, joint-stock companies, associations, or insurance companies organized under the authority of the United States or any State or Territory thereof, including Alaska and District of Columbia, such net income relates not only to the business carried on within the confines of the United States, but to income received from business transacted in any foreign country as well. In case of corporations, joint-stock companies, and associations organized under the authority of foreign countries the terms "Gross income," "Net income," and "Authorized deductions" relate only to business transacted within the United States or any State or Territory thereof.

ARTICLE 2.—*Gross Income.*

The following definitions and rules are given for determining the gross income of the various classes of corporations:

1 A. *Banks and other financial institutions.*—Gross income consists of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax) derived from all other sources, as shown by the entries on its books from January 1 to December 31 of the year for which return is made.

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1 B. *Insurance companies.*—Same as 1 A above.

2. *Transportation companies.*—Same as 1 A above.

3. *Manufacturing companies.*—Gross income received during the year from all sources will consist of the total amount, ascertained through an accounting, that shows the difference between the price received for the goods as sold and the cost of such goods as manufactured. The cost of goods manufactured shall be ascertained by an addition of a charge to the account of the cost of goods as manufactured during the year of the sum of the inventory at beginning of the year and a credit to the account of the sum of the inventory at the end of the year. To this amount should be added all items of income received during the year from other sources, including dividends received on stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax. In the determination of the cost of goods manufactured and sold as above such cost shall comprehend all charges for maintenance and operation of manufacturing plant, but shall not embrace allowances for deprecia-

tion of property nor for losses sustained which are to be taken account of in ascertaining the net income subject to tax under the proper heading in the authorized deductions.

4. *Mercantile companies.*—Gross amount of income received during the year from all sources consists of the total amount ascertained through inventory, or its equivalent, which shows the difference between the price received for goods sold and the cost of goods purchased during the year, with an addition of a charge to the account of the sum of the inventory at beginning of the year and a credit to the account of the sum of the inventory at the end of the year. To this amount should be added all items of income received during the year from other sources inclusive of dividends received on stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax. In determining this amount no account shall be taken of allowances for depreciation of property, nor for losses sustained which are to be taken account of in ascertaining the net income subject to tax under the proper heading in the authorized deductions.

5. *Miscellaneous.*—Gross income consists of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax) derived from all other sources as shown by the entries on the books from January 1 to December 31 of the year for which return is made.

24 It will be noted from these definitions that gross income is practically the same as gross profits, the only difference being that gross income is more inclusive, embracing as it does not only gross profits of the corporation, joint-stock company and association itself, but also all amounts of income received from other sources. It is immaterial whether any item of gross income is evidenced by cash receipts during the year or in such other manner as to entitle it to proper entry on the books of the corporation from January 1 to December 31 for the year in which return is made.

Sale of capital assets.—In ascertaining income derived from the sale of capital assets, if the assets were acquired subsequent to January 1, 1909, the difference between the selling price and the buying price shall constitute an item of gross income to be added to or subtracted from gross income according to whether the selling price was greater or less than the buying price. If the capital assets were acquired prior to January 1, 1909, the amount of increment or depreciation representing the difference between the selling and buying price is to be adjusted so as to fairly determine the proportion of the loss or gain arising subsequent to January 1, 1909, and which proportion shall be deducted from or added to the gross income for the year in which the sale was made. But for the purpose of determining the selling price, as provided in this section, there shall be added to the price actually realized on sale any amount which has already been set aside and deducted from gross income by way of deprecia-

tion as defined in article 4 and has not been paid out in making good such depreciation on the property sold.

Where a corporation is engaged in carrying on more than one class of business, gross income derived from the different classes of business shall be ascertained according to the definitions above, applicable thereto.

ARTICLE 3.—*Net Income.*

Net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any, and in the case of insurance companies the sums other than dividends, paid within the year on policy and annuity contracts and the net addition, if any, required by law to be made within the year to reserve funds; (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association, or trust company, all interest actually paid by it within the year on deposits." In case of corporations, joint stock companies, and associations organized under the laws of a foreign country, "the proportion of its paid-up capital stock outstanding at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States and any of its Territories, Alaska, and the District of Columbia bears to the gross amount of its income derived from all sources within and without the United States; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein; (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed.

The section further provides:

That in the case of a corporation, joint-stock company, or association, or insurance company, organized under the laws of a foreign country, such net income shall be ascertained (by making like deductions) from the gross amount of its income received within the year from business transacted and its capital invested within the United States and any of its Territories, Alaska, and the District of Columbia.

Also that:

In the case of assessment insurance companies the actual deposit of sums with state or territorial officers, pursuant to law, as additions to guaranty or reserve fund, shall be treated as being payments required by law to reserve fund.

Also (third paragraph) that:

There shall be deducted from the amount of the net income of each of such corporations, joint-stock companies, or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars.

The net income, therefore, is the remainder of the gross income after making the specified deductions.

ARTICLE 4.—*Deductions.*

The specified deductions actually paid within the year, set forth in the statute and as described in article 3 preceding, shall include all proper items of expenses and charges under the respective heads as designated. The amount returned for ordinary and necessary expenses actually paid within the year out of income in maintenance and operation of the business and properties of the corporation should not, however, embrace allowances for depreciation of fixed property which are otherwise to be taken account of under the proper heading in the authorized deductions, nor expenses paid within the year and charged to such allowances for depreciation credited in the current year or in previous years. In ascertaining expenses proper to be included in the deductions to be made under this article, corporations carrying materials and supplies on hand for use should include in such expenses the charges for materials and supplies only to the amount that the same are actually disbursed and used in operation and maintenance during the year for which the return is made.

26 It is immaterial whether the deductions are evidenced by actual disbursements in cash, or whether evidenced in such other way as to be properly acknowledged by the corporate officers and so entered on the books as to constitute a liability against the assets of the corporation, joint-stock company, association, or insurance company making the return.

Losses.—The deduction for losses must be in respect of losses actually sustained during the year and not compensated by insurance or otherwise. It must be based upon the difference between the cost value and salvage value of the property or assets, including in the latter value such amount, if any, as has in the current or previous years been set aside and deducted from gross income by way of depreciation as defined in the following section and not been paid out in making good such depreciation.

Depreciation.—The deduction for depreciation should be the estimated amount of the loss, accrued during the year to which the return relates, in the value of the property in respect of which such deduction is claimed that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put, and which

loss has not been made good by payments for ordinary maintenance and repairs deducted under the heading of expenses of maintenance and operation or in the ascertainment of gross income. This estimate should be formed upon the assumed life of the property, its cost value, and its use. Expenses paid in any one year in making good exhaustion, wear and tear, or obsolescence in respect of which any deduction for depreciation is claimed must not be included in the deduction for expense of maintenance and operation of the property or in the ascertainment of gross income, but must be made out of accumulative allowances deducted for depreciation in current and previous years.

ARTICLE 5.—*Inventories.*

It will be noted that an inventory or its equivalent of materials, supplies, and merchandise on hand for use or sale at the close of each calendar year is essential in the case of certain corporations in order to determine the gross income, and in case of other corporations to determine their expenses of operation. Where such inventory or its equivalent was not taken at the close of the year 1908, a supplemental statement showing such inventory approximately must be submitted with the return on the regular form. Such supplemental statement shall be verified under oath by the treasurer or principal financial officer in submitting the same.

Where any item under any of the deductions is of an unusual nature a special explanatory note referring to such item shall be made and attached to the form at the appropriate place and made a part thereof by proper reference.

Paragraph 3 of said section 38 also provides:

and said tax shall be computed upon the remainder of said net income of such corporation, joint stock company or association, or insurance company, for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter; and on or before the first day of March, nineteen hundred and ten, and the first day of March in each year thereafter, a true and accurate return under oath or affirmation of its president, vice-president, or other principal officer, and its treasurer or assistant treasurer, shall be made by each of the corporations, joint stock companies or associations, and insurance companies, subject to the tax imposed by this section, to the collector of internal revenue for the district in which such corporation, joint stock company or association, or insurance company, has its principal place of business, or, in the case of a corporation, joint stock company or association, or insurance company, organized under the laws of a foreign country, in the place where its principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of Treasury, shall prescribe.

Each return so made is required to set forth:

(*a*) The total amount of the paid-up capital stock of such corporations, joint-stock companies or associations, or insurance companies, outstanding at the close of the year;

(*b*) The total amount of bonded and other indebtedness of such

oration, joint-stock company or association, or insurance com-
y, at the close of the year;
) The gross amount of the income of such corporation, joint-
k company or association, or insurance company, received during
year from all sources, and if organized under the laws of a for-
country, the gross amount of its income received within the year
business transacted and capital invested within the United
es and any of its territories, Alaska, and the District of Columbia.
uch returns are also required to set forth the items claimed as
uctions (Article 4), also the net income after such deductions
been made.

ARTICLE 6.

Under the authority conferred by this act forms of return have
n prescribed, in which the various items specified in the law are
be stated.
Blank forms of this return will be mailed to collectors and should
furnished to every corporation, not expressly excepted, on or be-
January 1, 1910, and on or before January 1st of each year
reafter. Failure on the part of any corporation, joint-stock com-
y, association, or insurance company liable to this tax, to receive
lank form will not excuse it from making the return required by
, or relieve it from any penalties for failure to make the return in
prescribed time. Corporations not supplied with the proper
ns for making the return should make application therefor to
collector of internal revenue in whose district is located its prin-
al place of business. Each corporation should carefully prepare
return so as to fully and clearly set forth the data therein called

Bookkeeping.—No particular system of bookkeeping or account-
will be required by the Department. However, the business
transacted by corporations, joint-stock companies, associa-
tions, or insurance companies must be so recorded that each
and every item therein set forth may be readily verified by an
mination of the books and accounts, where such examination is
med necessary.
Calendar year.—As the law specifically provides that the tax im-
ed shall be computed on the net income during each "*calendar*
ar," returns of income based on any period other than the calendar
ar can not be accepted.
Corporations organized during the year or going into liquidation
ring the year should nevertheless render a sworn return on the
scribed form.

ARTICLE 7.

Collectors will see that as soon as each return made by any corpora-
n is received a record on Form 632 is made, setting out the name
the corporation making the return, the nature of the principal
siness transacted, the location of principal place of business, with
t income reported, and the date on which such return was re-
ived. The date of receipt in each case will be noted in the last

2
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column of that form, in which column the list on which assessmen is made will also be noted. For this purpose the column so used ma be subdivided, or the date of receipt of such returns may be note in red ink over the date entered therein as to such assessment list.

Any collector will, whenever it appears advisable to do so, reque that a revenue agent be specially designated to collect and furnis this office with such other data as, in his judgment, is necessary t determine the actual amount of tax to be assessed against any corpo ration, joint-stock company, or association which under the law se forth in these regulations is required to make return.

Such returns are required to be made not later than March 1 o each year, and any failure to comply with the law in this regar should be at once reported by the collector to the Commissioner o Internal Revenue.

To enable collectors to determine whether all returns due hav been received, a careful canvass of each district should be made, an all corporations, joint-stock companies, and associations subject t the tax imposed should be listed as above directed.

ARTICLE 8.

For statistical purposes all such corporations, joint-stock com panies, and associations will be classified as follows:

CLASS A: *Financial and commercial.*—Including banks, bankin associations, trust companies, guaranty and surety companies, titl insurance companies, building associations (if for profit), and insu ance companies, not specifically exempt.

CLASS B: *Public service.*—Such as railroads, steamboat, ferryboa and stage-line companies; pipe-line, gas, and electric-light companies express, transportation, and storage companies; telegraph and tel phone companies.

CLASS C: *Industrial and manufacturing.*—Such as mining, lum
ber, and coke companies; rolling mills; foundry and machin
29 shops; sawmills; flour, woolen, cotton, and other mills; manu
facturers of cars, automobiles, elevators, agricultural imple ments, and all articles manufactured wholly or in part from meta wood, or other material; manufacturers or refiners of sugar, molasse sirups, or other products; ice and refrigerating companies; slaughte house, tannery, packing, or canning companies, etc.

CLASS D: *Mercantile.*—Including all dealers (not otherwis classed as producers or manufacturers) in coal, lumber, grain, prod uce, and all goods, wares and merchandise.

CLASS E: *Miscellaneous.*—Such as architects, contractors, hotel theater, or other companies, or associations, not otherwise classed.

When classified as above indicated the names of the various cor porations, companies, and associations will be listed alphabetically and will be numbered consecutively (commencing with No. 1 in *eac* class), and in forwarding returns or papers subsequently rendered o submitted by such corporations or companies collectors will see tha the same have placed thereon the designating class letter and numbe corresponding with those noted on the lists herein required to b furnished.

ARTICLE 9.—*Examination of Books, etc., by Revenue Agent.*

Paragraph 4 of said section 38 provides:

Fourth. Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the commissioner justifies the belief that the return made by any corporation, joint stock company or association, or insurance company, is incorrect, or whenever any collector shall report to the Commissioner of Internal Revenue that any corporation, joint stock company or association, or insurance company has failed to make a return as required by law, the Commissioner of Internal Revenue may require from the corporation, joint stock company or association, or insurance company making such return such further information with reference to its capital, income, losses, and expenditures as he may deem expedient; and the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of such return or for the purpose of making a return where none has been made, is hereby authorized, by any regularly appointed revenue agent specially designated by him for that purpose, to examine any books and papers bearing upon the matters required to be included in the return of such corporation, joint stock company or association, or insurance company, and to require the attendance of any officer or employee of such corporation, joint stock company or association, or insurance company, and to take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons; and the Commissioner of Internal Revenue may also invoke the aid of any court of the United States having jurisdiction to require the attendance of such officers or employees and the production of such books and papers. Upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made. All proceedings taken by the Commissioner of Internal Revenue under the provisions of this section shall be subject to the approval of the Secretary of the Treasury.

30 ARTICLE 10.—*Assessment and Collection of Tax, etc.*

Paragraph 5 of said section 38 provides:

Fifth. All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with false or fraudulent intent, he shall add one hundred per centum of such tax, and in case of a refusal or neglect to make a return or to verify the same as aforesaid he shall add fifty per centum of such tax. In case of neglect occasioned by the sickness or absence of an officer of such corporation, joint stock company or association, or insurance company, required to make said return, or for other sufficient reason, the collector may allow such further time for making and delivering such return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax originally assessed unless the refusal, neglect, or falsity is discovered

after the date for payment of said taxes, in which case the amount so added shall be paid by the delinquent corporation, joint stock company or association, or insurance company, immediately upon notice given by the collector. All assessments shall be made and the several corporations, joint stock companies or associations, or insurance companies, shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due.

Upon the receipt and verification of the returns rendered, the tax as ascertained to be due will be assessed as above prescribed; and notice of such assessment will be given and subsequent demand made (if necessary) on Forms 17 and 21, respectively.

In case of failure to make returns within the time and manner required by the statute, or where the return rendered is found or believed to be incorrect, action in such cases will be taken, as provided in paragraph 4 of the law.

The additional tax imposed by paragraph 5 of the law for failure to make the required return, or for making a false or fraudulent return, will in all cases be assessed as therein provided.

ARTICLE 11.—*Returns to Constitute Public Records.*

Paragraph 6 of said section 38 provides:

Sixth. When the assessment shall be made, as provided in this sections, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the
31 office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

ARTICLE 12.—*Penalties.*

Paragraphs 7 and 8 of section 38 provide:

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not

provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Eighth. If any of the corporations, joint stock companies or associations, or insurance companies, aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint stock company or association, or insurance company shall be liable to a penalty of not less than one thousand dollars and not exceeding ten thousand dollars.

Any person authorized by law to make, render, sign, or verify any return who makes any false or fraudulent return, or statement, with intent to defeat or evade the assessment required by this section to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

ARTICLE 13.—*Certain Revenue Laws Made Applicable, and Jurisdictions Conferred on United States Courts to Compel Attendance of Witnesses, etc.*

Paragraph 8 further provides:

All laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section.

Jurisdiction is hereby conferred upon the circuit and district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books, as aforesaid, shall reside, to compel such attendance, production of books, and testimony by appropriate process.

ARTICLE 14.—*Collection of Tax.*

The tax assessed under the provisions of this act will be collected and will be receipted for on Form 1, as in the case of other assessed taxes. Unless paid within the time fixed by the statute, notice and demand should be at once issued, and, in case of nonpayment, distraint proceedings should be instituted without delay.

ROYAL E. CABELL,
Commissioner.

Approved:

FRANKLIN MACVEAGH,
Secretary of the Treasury.

32 PLAINTIFF'S EXHIBIT B.

Form No. 638.

To be Filled in by Collectors.

List No. —.
Class ——.
—— District of ——.

To be Filled in by Internal Revenue Bureau.

Assessment List —— —, 19—.
Page —, Line —.
Date received and filed —— —, 19—.

United States Internal Revenue.

Return of Annual Net Income.

(Section 38, Act of Congress Approved August 5, 1909.)

Miscellaneous Corporations.

Return of net income received during the Year ending December 31, 19—, by —— ——, a corporation, the principal place of business of which is located at —— in the State of ——.

1. Total amount of paid-up stock outstanding at close of year ..... $——
2. Total amount of bonded or other indebtedness outstanding at close of year..... $——
3. Gross Income (See Note A)..... $——

Deductions.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation (see Note B)..... $——
5. (*a*) Total amount of loss sustained January 1 to December 31.. $——
   (*b*) Total amount of depreciation, January 1 to December 31.. $——
   Total (see Note B)..... $——
6. Total amount of interest January 1 to December 31 on bonded indebtedness to an amount not to exceed amount of paid-up capital at close of year (see Note B)... $——

7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof ..... $———
(*b*) Foreign taxes paid ..... $———
Total (see Note B) ..... $———

8. Amount received by way of dividends upon stock of other corporations, joint stock companies, associations, and insurance companies subject to this tax ..... $———
Total Deductions ..... $———

9. Net Income ..... $———
10. Specific deduction from net income allowed by law ... $5,000.00
11. Amount on which tax at one per centum is to be calculated ..... $———

STATE OF ——,
County of ——, *To wit:*

—— ——, President, and —— ——, Treasurer, of the —— corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, without any deduction, whatsoever received from all sources by the said corporation during the year stated and that the net income therein set forth is the full amount on which tax is proper to be assessed.

—— ——, *President.*
—— ——, *Treasurer.*

Sworn and subscribed to before me this — day of ——, 19—.
—— ——. [SEAL.]

NOTE A.—Gross income shall consist of the total of the gross revenue derived from the operation and management of its business and properties, together with all amounts of income from other sources, including dividends on stock of other organizations subject to this special excise tax received, as shown by entries upon its books from January 1 to December 31 of the year for which return is made.

NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the return and entered as such on its books from January 1 to December 31 of the year for which return is made.

☞NOTE C.—This form, properly filled out and executed, must be in the hands of the Collector of Internal Revenue for the district

in which is located the principal office of the corporation makin the return, on or before March 1.

33 [Endorsed:] Form No. 638. U. S. Internal Revenu Return of Annual Net Income. (Sec. 38, Act of Congres August 5, 1909.) Miscellaneous Corporations. Return of net i come received during the year ending December 31, 19—, by — a corporation, the principal place of business of which is located —— in the State of ——. —— Collection District, State of — Fred von Baumbach, Collector of Internal Revenue, St. Paul, Min

34 And thereupon, upon application of said Solicitors a Wr of Subpœna was duly issued out of said Court and under th seal thereof duly vested, and in the words and figures following, t wit:

35 (Original.)

UNITED STATES OF AMERICA,
District of Minnesota, Fifth Division:

The President of the United States of America to Clark Iron Com pany and John G. Williams, William Alden Smith, Emily Clark, Charles R. Slight, and Frank Jewell, the Directors of sai Clark Iron Company, and Frank Jewell, as President, John G Williams, as Vice President, and Charles R. Slight, as Secretar and Treasurer of said Company, Greeting:

You are hereby commanded to be and appear at Rules, to be hel at the office of the Clerk of the Circuit Court of the United State for the District of Minnesota on the first Monday of April next, at th City of Duluth, then and there to answer the Bill of Complaint o Oscar Mitchell citizen of the State of Minnesota, filed against you o the 10th day of February, A. D. 1910, hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of th Supreme Court of the United States, the 10th day of February 191

Issued at my office in the City of Duluth, under the seal of sai Circuit Court, the day and year last aforesaid.

[Seal of U. S. Circuit Court.]

HENRY D. LANG, *Clerk,*
By THOS. H. PRESSNELL, *Deputy.*

Memorandum: The above named defendants to enter their appea ance in this suit in the Clerk's office aforesaid, on or before the da at which this writ is returnable; otherwise the bill may be taken p confesso.

HENRY D. LANG, *Clerk,*
By THOS. H. PRESSNELL, *Deputy.*

WASHBURN, BAILEY & MITCHELL,
Complainant's Solicitors.

Endorsed: Chancery Subpœna. Returned by the United Stat Marshal and filed. Henry D. Lang, Clerk, By Thos. H. Pressnel Deputy.

36 And afterwards towit, on the 11th day of February, A. D. 1910, came the defendants and filed in the clerk's office of said Court their Demurrer to the Bill of Complaint in the words and figures following, towit:

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

OSCAR MITCHELL, Plaintiff,

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN Smith, Emily J. Clark, Charles R. Sligh, and Frank Jewell, the Directors of said Clark Iron Company, and Frank Jewell, as President, John G. Williams, as Vice President, and Charles R. Sligh, as Secretary and Treasurer, of said Company, Defendants.

Demurrer.

The Demurrer of Clark Iron Company and Others, the Defendants Above Named, to the Bill of Complaint of Oscar Mitchell, Complainant.

These defendants by protestation, not confessing nor acknowledging all or any of the matters and things in the said bill of complaint contained, to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to the said bill, and for cause of demurrer show: That it appears on the face of said bill of complaint that the complainant is not entitled to the relief prayed for in said bill of complaint, or any part thereof; but that the act set forth in said bill of complaint is in all respects constitutional and valid.

Wherefore, these defendants demur to the said bill, and to all matters and things therein contained, and pray the judgment
37 of this honorable court whether they shall be compelled to make any further or other answer thereto, and pray to be dismissed with their reasonable costs in this behalf sustained.

JOHN G. WILLIAMS,
Solicitor for Defendants.

I certify that in my belief the foregoing demurrer of the defendants above named to the bill of complaint of Oscar Mitchell, is well founded in law, and proper to be filed in the above cause.

JOHN G. WILLIAMS,
Solicitor for Defendants.

STATE OF MINNESOTA,
County of St. Louis, ss:

John G. Williams, one of the above named defendants, on oath says that he has read the foregoing demurrer to the bill of complaint of Oscar Mitchell in this suit, and that the same is not interposed for the purpose of delaying the said suit or other proceedings therein.

JOHN G. WILLIAMS.

Subscribed and sworn to before me this 11th day of Februa
1910.

ARTHUR HOWELL,
Notary Public, St. Louis County, Minnesota.

My commission expires May 31, 1913.

38 Endorsed: Demurrer. Filed February 11th, 1910. Hen
D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

And thereafter on the 12th day of February, 1910, the followi
Order Sustaining Demurrer was filed of record in said cause, in wo
and figures following, towit:

In the Circuit Court of the United States, District of Minneso
Fifth Division.

In Equity. No. 734.

OSCAR MITCHELL, Plaintiff,
vs.
CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALD
Smith, Emily J. Clark, Charles R. Sligh and Frank Jewell, t
Directors of said Clark Iron Company, and Frank Jewell, as Pre
dent, John G. Williams, as Vice-President, and Charles R. Slig
as Secretary and Treasurer, of said Company, Defendants.

This matter came on for hearing before the court on the demur
of the defendant to the bill of complaint of the plaintiff, John
Williams, Esq., appearing as solicitor for the defendants in supp
of said demurrer, and Washburn, Bailey & Mitchell appearing
solicitors for the plaintiff in opposition thereto.

The court having heard counsel, on due consideration,

It is ordered that said demurrer be, and the same is hereby s
tained, and the plaintiff having declined to amend his complaint or
re-plead,

It is ordered that decree be entered herein dismissing the said b
of complaint on the merits, without costs, the same having been
pressly waive- by the defendants.

Dated Duluth, Minn., February 12th, 1910.

PAGE MORRIS, *Judge.*

Endorsed: Order Sustaining Demurrer. Filed February 12
1910. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

And on the same day, towit, 12th day of February, 1910, the D
cree in said cause was filed with said clerk, in the words and figu
following, towit:

39 In the Circuit Court of the United States, District of Minnesota, Fifth Division.

In Equity. No. 734.

OSCAR MITCHELL, Plaintiff,

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN Smith, Emily J. Clark, Charles R. Sligh, and Frank Jewell, the Directors of said Clark Iron Company, and Frank Jewell, as President, John G. Williams, as Vice-President, and Charles R. Sligh, as Secretary and Treasurer, of said Company, Defendants.

This case having come on to be heard this 12th day of February, A. D. 1910, upon the demurrer of the defendant to the bill of complaint of the plaintiff, and the court having considered said demurrer and having sustained the same, and the plaintiff having declined to amend his complaint, or to replead, and the defendants having expressly waived costs,

It is ordered, adjudged and decreed that the said bill of complaint herein be, and the same is hereby dismissed upon the merits, without costs.

PAGE MORRIS, *Judge.*

Endorsed: Decree. Filed February 12, 1910. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

That still further on said day, towit, 12th day of February, 1910, there was filed of record in said cause an Appeal and Order allowing the same, in the words and figures following, towit:—

40 In the Circuit Court of the United States, District of Minnesota, Fifth Division.

In Equity. No. 734.

OSCAR MITCHELL, Plaintiff,

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN Smith, Emily J. Clark, Charles R. Sligh, and Frank Jewell, the Directors of said Clark Iron Company, and Frank Jewell, as President, John G. Williams, as Vice-President, and Charles R. Sligh, as Secretary and Treasurer, of said Company, Defendants.

The above named plaintiff, conceiving himself aggrieved by the decree made and entered on the 12th day of February, A. D. 1910 in the above entitled cause, does hereby appeal from the said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the

record, proceedings and papers upon which the said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, February 12th 1910.

WASHBURN, BAILEY, MITCHELL,
Solicitors for the Plaintiff,
709 *Lonsdale Bldg., Duluth, Minnesota.*

The foregoing claim of appeal is allowed.

Dated, February 12th 1910.

PAGE MORRIS,
District Judge.

41 Endorsed: Appeal and Order Allowing the Same. Filed February 12th, 1910. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

That on the same day, towit, the 12th day of February, 1910, there was filed of record in said cause the Assignment of Error on Appeal, in words and figures following, towit:

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

In Equity. No. 734.

OSCAR MITCHELL, Plaintiff,
vs.
CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN Smith, Emily J. Clark, Charles R. Sligh, and Frank Jewell, the Directors of said Clark Iron Company, and Frank Jewell, as President, John G. Williams, as Vice President, and Charles R. Sligh, as Secretary and Treasurer, of said Company, Defendants.

Assignment of Error.

And now on the 12th day of February, A. D. 1910 comes the above named plaintiff by Washburn, Bailey & Mitchell his solicitors and says:

That the decree in the above entitled cause is erroneous and against the just rights of said plaintiff for the following reason: That the demurrer of the defendants should have been over ruled for the reason that the statute referred to in the Bill of Complaint is unconstitutional and void for the reasons therein set forth.

Wherefore Said plaintiff prays that the said decree be reversed and that said court may be directed to over rule said demurrer, and unless some defense good in law is interposed, to enter a decree in accordance with the prayer of said bill.

WASHBURN, BAILEY, MITCHELL,
Solicitors for the Plaintiff,
709 *Lonsdale Bldg., Duluth, Minnesota.*

Endorsed: Assignment of Error. Filed February 12th, 1910. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

42 And on the same day towit, on the 12th day of February, 1910, there was filed a Bond on Appeal in said cause, in words and figures following, towit:

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

In Equity. No. 734.

OSCAR MITCHELL, Plaintiff,

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN Smith, Emily J. Clark, Charles R. Sligh, and Frank Jewell, the Directors of said Clark Iron Company, and Frank Jewell, as President, John G. Williams, as Vice President, and Charles R. Sligh, as Secretary and Treasurer, of said Company, Defendants.

Know all men by these presents, That we, Oscar Mitchell as principal and W. D. Bailey and A. C. Gillette as sureties are held and firmly bound unto the above named defendants in the full and just sum of Five Hundred Dollars ($500.) to be paid to the said defendants their successors, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with out seals and dated this 12th day of February, A. D. 1910.

Whereas On the 12th day of February, A. D. 1910 a decree was rendered in the above entitled action against the above named plaintiff and in favor of the above named defendants, dismissing the Bill of Complaint upon the merits and the said plaintiff having taken and had allowed an appeal and filed a copy thereof in the clerk's office of the said court, to reverse the said decree and a citation directed to the said defendants, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be held in the city of Washington in the District of Columbia on the 19th day of February, 1910, having been issued,

Now, the condition of the above obligation is such that if
43 the said Oscar Mitchell shal-, prosecute said appeal to effect and answer all costs, if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

OSCAR MITCHELL. [SEAL.]
W. D. BAILEY. [SEAL.]
A. C. GILLETTE. [SEAL.]

Signed, Sealed and Delivered in presence of
F. M. EMANUELSON.
C. M. VAN NORMAN.

Approved by
PAGE MORRIS, *Judge*.

February 12th, 1910.

Endorsed: Bond on Appeal. Filed February 12, 1910. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

That on the same day, towit, on the 12th day of February, A. D. 1910, there was issued an original Citation on Appeal, with proof of service of same, in said cause, in the words and figures following, towit:

44 In the Supreme Court of the United States.

OSCAR MITCHELL, Appellant,

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN Smith, Emily J. Clark, Charles R. Sligh and Frank Jewell, the Directors of said Clark Iron Company, and Frank Jewell, as President, John G. Williams, as Vice President, and Charles R. Sligh, as Secretary and Treasurer, of said Company, Appellees.

The United States of America to Clark Iron Company and John G. Williams, William Alden Smith, Emily J. Clark, Charles R. Sligh and Frank Jewell, the Directors of said Clark Iron Company, and Frank Jewell as President, John G. Williams as Vice President and Charles R. Sligh as Secretary and Treasurer of said Company:

You are hereby cited and admonished to be and appear at the session of the United States Supreme Court to be holden at the city of Washington in the District of Columbia on the 19th day of February, A. D. 1910, pursuant to an appeal duly allowed and filed in the Clerk's office of the Circuit Court of the United States for the District of Minnesota, Fifth Division, wherein Oscar Mitchell is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 12th day of February, in the year of our Lord 1910 and of the Independence of the United States the One Hundred and Thirty-fourth.

PAGE MORRIS, *Judge.*

45 I hereby this 12th day of February, A. D. 1910, accept due and personal service of the foregoing citation on behalf of all of the Appellees named therein.

JOHN G. WILLIAMS,
Solicitor for Appellees.

46 [Endorsed:] Entered No. —. United States Supreme Court. Oscar Mitchell, Plaintiff, against Clark Iron Co., et al., Defendant. Citation on Appeal. Filed February 12, 1910. Henry D. Lang, Clerk. By Thos. H. Pressnel, Deputy Clerk. Washburn, Bailey & Mitchell, Attorneys for Pl'ff, 709 Lonsdale Building, Duluth, Minn.

47 Endorsed: Citation on Appeal. Filed February 12, 1910. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy.

48 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Fifth Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing, consisting of — pages, numbered consecutively from 1 to — inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at Duluth, in the District of Minnesota, this 12th day of February, A. D. 1910.

[U. S. Circuit Court Seal, Dist. of Minnesota, Fifth Division.]

HENRY D. LANG, *Clerk*,
By THOS. H. PRESSNELL, *Deputy*.

[Endorsed:] No. —. United States Circuit Court, District of Minnesota, — Division. Oscar Mitchell vs. Clark Iron Company et al., Defendant. Record on Appeal.

Endorsed on cover: File No. 22,026. Minnesota C. C. U. S. Term No. 800. Oscar Mitchell, appellant, vs. Clark Iron Company et al. Filed February 17th, 1910. File No. 22,026.

No. 800.

Office Supreme Court, U. S.
FILED.
FEB 21 1910
JAMES H. McKENNEY,

Supreme Court of the United States

OCTOBER TERM, 1909.

OSCAR MITCHELL, *Appellant,*

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN SMITH, EMILY J. CLARK, CHARLES R. SLIGH and FRANK JEWELL, the Directors of said Clark Iron Company, and FRANK JEWELL, as President, JOHN G. WILLIAMS as Vice President and CHARLES R. SLIGH as Secretary and Treasurer of said Company,

Appellees.

MOTION TO ADVANCE.

J. L. WASHBURN,
W. D. BAILEY,
OSCAR MITCHELL,
Solicitors for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1909.

OSCAR MITCHELL, *Appellant,*

vs.

CLARK IRON COMPANY and JOHN G. WILLIAMS, WILLIAM ALDEN SMITH, EMILY J. CLARK, CHARLES R. SLIGH and FRANK JEWELL, the Directors of the Clark Iron Company, and FRANK JEWELL, as President, JOHN G. WILLIAMS as Vice President and CHARLES R. SLIGH as Secretary and Treasurer of said Company,

Appellees.

Comes now the above named appellant and moves the court to advance the above entitled cause and set it down for hearing with other causes now pending in this court involving the question of the constitutionality of the Act of Congress entitled:--"An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," which was approved and signed by the President of the United States on the 5th day of August, A. D. 1909, which causes, the undersigned are informed, are set for hearing on March 14th, 1910.

This motion is made for the reason that the only question involved herein is the question of the validity of said Act of Congress in so far as it applies to a corporation whose only source of income is rent or royalty paid for the privilege of mining iron ore from land owned by it and the causes above referred to involved, as the undersigned are informed and believe, the question of the constitutionality of said Act of Congress and it is believed it will subserve the cause of justice and faciliate the labors of this court to have the above entitled cause argued and submitted with the other causes involving the question of the constitutionality of said Act of Congress.

Dated, February 14th, 1910.

John Mashburn

W. D. Bailey

Oscar Mitchell

Solicitors for Appellant.

As representing the appellees in the above entitled proceeding, I agree to the immediate consideration of the foregoing motion and consent to the making of the order therein asked for and join in requesting the court to set this cause down for hearing with the other causes above referred to.

Dated, February 14th, 1910.

John G. Williams

Solicitor for above named Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

OSCAR MITCHELL,
Appellant,

vs.

CLARK IRON COMPANY AND JOHN G. WILLIAMS, WILLIAM ALDEN SMITH, EMILY J. CLARK, CHARLES R. SLIGH AND FRANK JEWELL, THE DIRECTORS OF THE CLARK IRON COMPANY, AND FRANK JEWELL AS PRESIDENT, JOHN G. WILLIAMS AS VICE-PRESIDENT, AND CHARLES R. SLIGH AS SECRETARY AND TREASURER OF SAID COMPANY,
Appellees.

No. 800.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

STATEMENT OF THE CASE.

The defendant Clark Iron Company is a corporation organized under the laws of the State of Minnesota, with its principal place of business in the city of Duluth, in the Fifth Division of the District of Minnesota, and is entitled, under the laws of said State, to own and hold real estate. The

other defendants are officers and directors of the said corporation. (Folio 3 of Transcript.)

The defendant company is the owner of 280 acres of land in said State, described in the bill of complaint. (Folio 3 of Transcript.) These lands have been explored for iron, iron ore discovered therein, and the same have been leased for some years to other persons and corporations for iron mining purposes, and the sole business of the defendant corporation has been to watch over and care for said lands and to collect its rentals therefrom and distribute the same, by means of dividends, to its stockholders. Its sole income for several years has been derived from such rentals or royalties based upon the quantity of iron ore mined and removed from said lands by its lessees. (Folio 3 of Transcript.)

The plaintiff is a stockholder in said corporation, and brought this suit for himself and others similarly situated, to enjoin the defendant corporation and its officers from making the returns and paying the taxes provided in Section 38 of the Act of Congress of August 5, 1909, entitled: "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," and from making voluntary compliance with said Act, which the officers and directors had determined to do in order to avoid the risks and penalties provided in the Act. The suit is based upon the alleged unconstitutionality and invalidity of the Act, as charged in the bill. (Folios 7 to 14 of Transcript.)

All the jurisdictional facts are duly alleged. The defendants appeared and filed a general demurrer, which was sustained and decree entered. (Folios 31-33 of Transcript.)

The plaintiff appealed to this Court and assigned error that the demurrer should have been overruled, for the reason that the statute of the United States referred to in the complaint is unconstitutional and void for the reasons stated in the bill. (Folios 33 and 34 of Transcript.)

The cause was docketed as No. 800, Transcript of Record, was duly printed, and upon motion the same was, by order of this Court, made on February 28th, advanced upon the Calendar to March 14th, to be heard with other cases involving the validity of said Section 38, commonly known as the Corporation Tax Law, with leave to file a brief in this case.

ASSIGNMENT OF ERROR.

The Circuit Court erred, and the decree of the Circuit Court is erroneous and against the just rights of this appellant because the demurrer of the defendants should not have been sustained, but should have been overruled; and the judgment of dismissal was, therefore, erroneous and should be reversed, for that the said statute referred to in the bill of complaint is unconstitutional and void, for the reasons and upon the grounds set forth therein, and therefore this appellant was entitled to the relief sought in his said suit.

ARGUMENT.

I.

The Circuit Court properly had jurisdiction. The bill shows equity, if Section 38 of the Revenue Act of August 5, 1909, is invalid. If that section, which is complete in itself, independent of the residue of the Act, is valid, then the demurrer was properly sustained. The question which this appeal brings before this Court is, therefore, the validity of that section, which imposes the duty upon corporations generally, including the defendant corporation, to make returns of their incomes, and exacts the payment of a tax thereon, and constitutes such returns public records.

Stated more narrowly, what is here involved is the validity of such requirements as to the defendant, Clark Iron

Company, under the admitted and uncontrovertible facts stated in the bill.

We charged in the bill, and here reiterate in briefer form, that the whole enactment of said Section 38, providing for this so-called corporation tax, is unconstitutional and void, in this:

(1) That, as an excise tax, the same is obnoxious to the provisions of Section 8, Article I, of the Constitution, which requires that "All duties, imposts and excises shall be uniform throughout the United States," in that the taxes authorized by the Act were neither intrinsically nor geographically uniform, but, on the contrary, were so unequal and partial as not to be within the taxing power of the United States, and to be violative, not only of said Section 8 of Article I of the Constitution, but of the spirit and intent of the whole instrument;

(2) That, as a tax upon the net income of corporations, it includes taxes upon the income of both real and personal property, and investments therein, including income from municipal bonds and other public securities; that such taxes are direct taxes and not apportioned by the Act as required by Sections 2 and 9 of Article I of the Constitution, and that insofar as the same embrace income from public securities, the tax is laid upon prohibitive subjects; that the whole section forms one entire and indivisible scheme of taxation, and that the said direct taxes are so intermingled with and inseparable from the other subjects of taxation that the whole enactment is unconstitutional and must fall together.

(3) That the tax, not being a valid excise tax levied with respect to the doing of any kind or class of business, nor upon the production or consumption or sale of any particular commodity or product or class thereof, nor upon the doing of any particular kind or class of business, even by a corporation, nor upon corporations deriving their existence by virtue of any laws of the United States, but being laid with

respect to the doing of any kind of business when done by a corporation, and with respect to the income of corporations only; that the same is, therefore, a tax upon the franchises of corporations granted by sovereign States and, as such, is obnoxious to Article X of the Constitution, and not within the taxing power of Congress.

(4) That because of the provisions for enormous and excessive penalties for failure to comply with its terms, intended to prevent or restrain parties taxed from contesting its validity, and as well for all the other reasons set forth, the act denies to the corporations taxed the equal protection of the laws, contrary to Section 1 of Article XIV of the Amendments to the Constitution; operates to deprive such corporations of their property without due process of law, contrary to Article V of the Amendments to the Constitution, and contravenes Article VIII of the Amendments, which provides that excessive fines shall not be imposed.

II.

We may concede that Congress has, under the Constitution, a broad field within which to exercise the power of taxation. There are, however, some things which it cannot tax. The manner in which the power shall be exercised, however, is controlled by two limitations. First, if the taxes be direct taxes, they must be apportioned among the States according to population. Second, if the taxes be in the nature of excises, imposts or duties, they must be uniform throughout the United States. Whatever tax is laid must come within one or the other of these provisions, and not contravene either of them.

See Opinion of Chief Justice Fuller, in Pollock vs. Farmers' Loan & Trust Company, on re-argument, 158 U. S., 601; Book 39 L. Ed., 1108, particularly on page 1119.

No attempt was made to apportion the taxes, and hence the taxes authorized by the act, if they are direct taxes, cannot be sustained. We defer consideration of that for a moment, for as Congress took pains to name the tax an excise tax (lest it might not otherwise be discovered), it is logical for us to consider first *whether the act is constitutional as laying a valid excise tax.*

Section 8 of Article I of the Constitution requires that, "All duties, imposts and excises shall be uniform throughout the United States." As an excise upon the transaction of business or any particular class of business, or the income therefrom, or from property owned by the corporations taxed, the discriminations are so glaring that it must be said that there is no pretense of intrinsic uniformity. The law does not operate with uniformity throughout the United States as an excise upon the doing of any act or class of acts, the conduct of some particular business or class of business, by whomsoever done, wheresoever done, according to its volume, or on any other uniform basis, because—

(1) A tax is laid on corporations only;

(2) No tax is laid on individuals or partnership firms, although doing the same kind of business and being competitors therein;

(3) Certain corporations mentioned in the act, formed for the profit and advantage of its members, are arbitrarily excepted from the operation of the law;

(4) No corporation whose income does not exceed five thousand dollars is required to pay any tax;

(5) A corporation holding stocks of any other corporations which are subject to the tax is not taxable upon the income or dividends received thereon. Whether such a corporation, if it held the stock of a score of other corporations, no one of which had a net income exceeding five

thousand dollars, would be required to pay a tax, is open to serious contention. It would seem clear that such holding company could hold the bulk of the stock in other corporations, and if such corporations' income but even slightly exceeded the five-thousand-dollar limit, so that they had in fact a nominal amount of tax to pay and thereby could certainly be said to be subject to the tax, the holding company would practically escape taxation.

(6) All sorts of inequalities are possible, and scarcely preventable, in the ascertainment of net income.

There can be no pretense of intrinsic uniformity as an excise tax upon business, nor if considered as an income tax.

The case of Spreckels Sugar Refining Company against McClain, Collector, 192 U. S., 397; 48 L. Ed., 496, has been relied upon to sustain the power of Congress to lay an excise tax upon the business of a corporation. The case is not an authority for any such contention. The act involved was one of the provisions of the "Act to provide ways and means to meet war expenditures, and for other purposes," which sought out many objects of taxation and laid taxes thereon by the various sections thereof. This case arose under Section 27 (See 30 Stats. at Large, 464), which laid a tax upon every person, firm or corporation carrying on or doing a business of refining petroleum or refining sugar.

In Pacific Insurance Company vs. Soule, Collector, 7 Wallace, 433, 19 L. Ed., 95, this Court defined an excise to be an inland imposition, sometimes upon the consumption of a commodity, sometimes upon the retail sale, sometimes upon the manufacturer, and sometimes upon the vendor. The case arose under the revenue act of 1864 as amended in 1866, by which, in the exigency and stress of the times, the Government levied a tax upon almost every conceivable object of taxation. Section 105 of the Act of 1864, 13 U. S. Stat. at Large, 276, provided for a tax of one and one-half per cent upon the gross receipts of pre-

miums or assessments for insurance from loss or damage by fire, or by the perils of the sea, made by every insurance company, whether inland, marine or fire, and by every association or individual engaged in the business of insurance against loss or damage by fire or by the perils of the sea and against every person, company or corporation who should issue tickets or contracts of insurance, etc., and against agents of foreign insurance companies. The law provided for a tax upon the business transacted. It laid an excise rate on the gross receipts of the business, by whomsoever done, whether by individual, partnership, corporation, association or agent. The tax was not a penalty fixed upon corporations for the privilege of doing business, nor a tax upon their corporate franchises. The law had none of the defects and inequalities of the act of 1909, and the latter act can draw no support from this case. It is also apparent that the Court in this case did give some force and effect to the question of *equality and uniformity*.

We are unwilling to believe that the Constitution dispenses with the principle of equality in the matter of taxation. Much of our trouble in both States and Nation has come by attempts to avoid or circumvent this principle. It is very popular with some people to tax other people if they themselves can escape. Legislation is too often hastily enacted to appease some temporary popular clamor or to advantage the controlling legislative faction in popular favor. Against all such legislation, the Constitution should be a bulwark of safety. If *equality* before the law, *equality* in bearing the burdens of government, *equality* in the levy and collection of taxes, and *equal* protection of the laws are to be abandoned, constitutional protection will become a fiction.

The contention, however, will be made that the provision of the Constitution requiring an excise tax to be uniform throughout the United States does not embrace the principle of equality in its operation on the individuals taxed,

but that geographical uniformity is all that is required. Knowlton vs. Moore, 178 U. S., 41; 44 L. Ed., 969, will doubtless be relied upon as authority for such contention. It is believed that nothing prior to that decision can be suggested as such authority. It is doubtful if the case can be said to go so far as to sustain the contention of geographical uniformity as applied to such a law as that now under consideration. The Government attorney claimed in the Knowlton case that "uniform throughout the United States" simply requires that whatever plan or method Congress adopts for laying taxes, the same plan must be made operative throughout the United States; that whenever a subject is taxed anywhere, it must be taxed everywhere throughout the United States, and at the same rate. If we may assume the above as indicating the definition of geographical uniformity as applied to an excise tax, it is apparent that the tax imposed by this law, treated as an excise on business or income or profits of business, or investment, is not even geographically uniform in its application; and what the Court said in the Knowlton case, as applied to the facts in that case, should not control here.

The tax is as glaringly lacking in geographical uniformity as in intrinsic uniformity as an excise tax. Suppose a certain class of business only had been taxed, and the tax was laid only when the business is done by a corporation, and suppose all such business to be done in one State by individuals, in another by firms and in another by corporations; would the excise apply with geographical uniformity as an excise on such business or income? Clearly, no. It is no different in its operation in that it applies to many or even all classes of business.

It is absolutely impossible to say that the tax operates as an excise with geographical uniformity in the different States or throughout the United States at large when a great and variable volume of the same business in different localities is not subjected to the excise. It will not save the

law for its sponsors to say that, under it, corporations (not now mentioning the exempted ones) are everywhere taxed upon their incomes and therefore the uniformity restriction of the Constitution has been complied with. Indeed, the only possible claim is that, not as an excise on business, or on any particular kind or class of business, but upon the doing of business by a corporation, does this law apply with even the faintest kind of uniformity. That, however, in the last analysis, simply means that as a tax on corporate franchises, the law applies with constitutional uniformity. It is, indeed, questionable whether uniformity will avail or is at all applicable to such a tax. Moreover, there are other constitutional objections to the tax as a tax upon corporate franchises, which will be considered in a subsequent paragraph.

We confidently assert that in all the annals of Congressional legislation and the construction thereof by this Court, there is not to be found such an act as the 1909 corporation tax section. It is an iniquitous measure, inspired by supposed political emergency; was hastily enacted, and depended upon juggling with the word "corporation" for favor in public opinion.

Corporations are everywhere existent and have largely supplanted partnerships, for good and salutary reasons, the most potent of which is the perpetuity of business and industrial enterprises, and the means offered for participation in the benefits thereof by many persons, including employees. We submit that, as an excise tax, the same is invalid not only as not being uniform throughout the United States, whether we say intrinsically or geographically, but because it is so fraught with discriminations, inequalities and arbitrary exemptions as to be without the taxing power, and is obnoxious to the fundamental principles of our Government.

Mr. Justice Brewer, in the case of Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283; L. Ed. Book 42, page 1037, with reference to the law then before the Court, said that, "Absolute equality is not obtainable, but where a tax directly, necessarily and intentionally creates inequality of burden, it then becomes imperative to find whether this inequality can find any constitutional justification."

This language is significant if applied to this case.

III.

THE TAXES IMPOSED BY THIS SECTION ARE NOT, HOWEVER, EXCISE TAXES. THEY ARE DIRECT TAXES. The fact that Congress labeled it a special excise tax does not make it so. This Court, in the Pollock case, said:

> "If a tax is a direct tax within the constitutional sense, the mere erroneous qualification of it as an excise will not take it out of the constitutional requirement as to apportionment."

This language was again quoted by the Court approvingly in the Knowlton case. That the substance, and not the shadow, determines the validity of the exercise of the power, is a maxim of this Court. If in substance and practical operation a tax is a direct tax, the form or manner of levying it does not change its character. Whether a tax is direct or indirect, within the meaning of the Constitution, depends upon its nature. A tax is not direct because it can be apportioned among the States; it is not an indirect one because it cannot fairly or without difficulty be apportioned. If direct, it must be apportioned. Whether this tax is called a franchise tax, an excise tax, or by whatsoever name, its burden is cast upon the income of property and business and, as such, at least so far as real and personal estate is

concerned, is a direct tax and must be apportioned. The wisdom of the Constitution is not on trial; if it were, it would doubtless be vindicated.

Pollock vs. Farmers' Loan & Trust Company, and Hyde vs. Continental Trust Company, 157 U. S., 429; 39 L. Ed., 759, and 159 U. S., 601; 39 L. Ed., 1108.

The tax imposed by this law is a tax upon the net income above the exemptions of all the corporations falling within its provisions. There is no exception as to sources of income. There are included rents, and income from real and personal estate, municipal bonds and other public securities —even the bonds of the United States. All kinds of investments for income are embraced in the law, including investments in real estate and personal property.

There are some things which are settled in this Court, and which are controlling here, viz: That taxes upon the income of real or personal estate are the same in effect as a tax on the property itself; that taxes laid upon income are equivalent to taxes upon the sources of such income, and that they are direct taxes and must be apportioned, or else they are unconstitutional, being obnoxious to Sections 2 and 9 of Article I of the Constitution; that taxes on the income of municipal bonds and other public securities, are upon prohibited subjects of taxation.

These questions we believe to have been forever settled in this Court by the decisions in the Pollock cases, which decisions were in harmony with a vast amount of authority submitted to and considered by the Court, and to a considerable extent reviewed in the opinions. And we do not deem these questions as open to discussion at this time. Certainly the Court will not again care to listen to elaborate argument, receive copious citations of authorities and again

go over these questions that have stood determined since the decisions in those cases. FURTHERMORE, THE SAME REASONS THAT IMPELLED THE COURT, ON THE SECOND HEARING OF THE POLLOCK AND HYDE CASES, TO DECLARE THE WHOLE ACT THEN UNDER CONSIDERATION VOID EXIST HERE WITH EVEN GREATER FORCE. It is as impossible here as it was there to separate any parts as valid from the enactment and say that Congress intended that they at least should stand although other provisions must fall. We here quote again the language of Chief Justice Shaw in the case of Warren vs. Charlestown, 2d Gray, 84, that:

> "If the different parts are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independent, and some parts are unconstitutional, all of the provisions which are thus dependent, conditional or connected must fall with them."

We quote again the language of Mr. Justice Matthews in Poindexter vs. Greenhow, 114 U. S., 279, wherein he said that:

> "While it is true that there may be cases where some part of the statute may be enforced as constitutional and another declared inoperative and void because unconstitutional, these are cases where the parts are so distinctly separable that each can stand alone, and where the Court is able to see and declare that the intention of the legislature was that the part pronounced valid should be enforceable even though the other part should fall."

And we here quote the language of Mr. Chief Justice Fuller in the decision in the Pollock case, wherein he said, at page 637 of the Official Edition, 1125 L. Ed.:

> "The tax imposed by Sections 27 to 37, inclusive, of the Act of 1894, so far as it falls on the income of realty and of personal property, being a direct tax within the meaning of the Constitution and therefore unconstitutional and void because not apportioned according to representation, all those sections constituting one entire scheme of taxation are necessarily invalid."

Under the authority of these cases, the law of 1909 must fall.

The defendant corporation, Clark Iron Company, has no other property except certain lands in the State of Minnesota, and no income save such as it receives by way of rentals or royalties from these lands, reserved to it under leases thereof made for iron mining purposes, which authorize mining operations on, and the removal of iron ore from the lands, the revenue therefrom being based upon the quantity mined and removed. Mining leases of this kind are of ancient origin and widespread existence. Under such instruments, coal, iron, salt and other minerals have been mined, and stone quarried, for generations. They have received judicial construction in many courts, including this Court. Their character received careful consideration in the Supreme Court of Minnesota in the case of State vs. Mabel Evans, reported in 99 Minn., 223, 108 N. W. Rep., 958, where the question of the character of such an instrument, whether evidencing a lease or sale, was determinative of its validity by reason of certain restrictions in the State Constitution. The Court, reviewing the voluminous list of authorities submitted, held that the customary method of developing, working and obtaining profits from

mineral lands at the time of the adoption of the Constitution of the State was by means of mineral leases similar to those in question; that the removal of ore from the demised lands was not deemed waste, but a reasonable means of securing the profits of the lands; that at common law a lessee for life or years was authorized to operate and take the profits of open mines, although the lease was silent concerning them, and might take the profits of new mines not opened, when his lease authorized it; that the conclusion to be drawn from the English cases is that from the beginning the rights of the man who owned the land and of the man who took the minerals from it were worked out through the law of tenancy, without the aid of the law of sales; that the theory was that the mineral was the product of the use for which the rent was paid, and that the tenant got his title to his mineral by a proper use of the demised premises, and that it was never a circumstance of significance that such use from its nature resulted in the gradual consumption or even exhaustion of the portion of the land of chief worth. And the Court said that a consideration of the cases in this country leads to the same conclusion, that the propriety of a lease for the purpose of developing and working mines is recognized by all of the cases, and that such leases do not constitute a sale of any part of the land, and that iron or other materials derived from the usual operation of mines or quarries constitute the rents or profits of the land.

State vs. Evans, 99 Minn., 223;
Bainbridge on the Law of Mines and Minerals, American Ed., page 197;
United States vs. Gratoit, 14 Peters, 526.
Snyder on Mines, Vol. 2, Chap. 2, page 932;
Offerman vs. Starr, 2 Pa. State, 394;
Moore vs. Miller, 8 Pa. State, 273;
Hyatt vs. Vincennes Bank, 113 U. S., 408;

Lehigh Zinc & Iron Company vs. Bamford, 150 U. S., 665;
Tennessee Oil, Gas & Mineral Company vs. Brown, 131 Fed., 696;
Reynolds vs. Hanna, 55 Fed., 783;
Coke upon Littleton, 53-b;
Clegg vs. Rowland, L. R., 2 Eq., 160.

A long line of state cases might be cited, all in substantial harmony; but we do not deem it either necessary or proper. The Pennsylvania cases were cited because of their early date.

So that the tax that will fall upon the defendant company and operate to deplete the revenues distributable to its stockholders, falls upon its income by way of rentals and royalties from the use and occupation of its lands and is, therefore, within the decisions of this Court, a tax upon the land itself—a direct tax, unconstitutional and void.

IV.

The tax not being a valid excise tax levied with respect to the doing of any kind of business, or class of business, nor upon the production or consumption or sale of any particular commodity or product, or class thereof, but being laid with respect to the doing of any kind of business when done by a corporation, and with respect to the income of corporations only, the same, to be upheld, must have to be held as a valid tax upon the franchises of corporations.

As to this we say, first, that a law that taxes without apportionment the income of the real and personal estate of part of the people is no more valid than one which taxes the like income of all the people; and that the tax is none the less direct, and none the less violative of the Constitution, which requires that such taxes be apportioned, because

the same applies to corporations only, or to that portion of the people whose business is transacted through corporations; and that beyond this fatal line, this law cannot be carried. But we say, further, that even though the same is a direct tax, at least so far as the subject of incomes upon real and personal estate is concerned, and invalid for the above reason, still as a tax laid only when the income is received by corporations, it is also subject to the charge that it is, in effect, an attempt to levy a tax upon the corporate franchises of such corporations, and that, as such, it cannot be sustained, for it is violative of Article X of the Constitution, that is the tenth amendment.

McCulloch vs. Maryland, 4 Wheat., 316, 4th L. Ed., 579;

Collector vs. Day, 11 Wallace, 113, 20 Law. Ed., 122;

Weston vs. Charleston, 2 Peters, 449, 7 L. Ed., 481;

California vs. Central Pacific Railroad Company, 127 U. S., 1, 32 L. Ed., 150;

Home Insurance Company vs. New York, 134 U. S., 594; 33 L. Ed., 1025;

Wisconsin Central Railroad Company vs. Price County, 133 U. S., 496, 33 L. Ed., 687;

Union Pacific Railroad Company vs. Peniston, 85 U. S., 5, 21 L. Ed., 787;

Osborn vs. Bank of U. S., 9 Wheat., 738, 6 L. Ed., 204;

West River Bridge Company vs. Dix, 47 U. S., 507, 12 L. Ed., 535;

San Bernardino County vs. Southern Pacific Railroad Company, 118 U. S., 417, 30 L. Ed., 125.

The case of McCulloch vs. Maryland, 4 Wheat., 316, declared several propositions of constitutional law which have remained a continued assistance to the courts. The Court

in that case said that the power to create implies a power to preserve; that the power to tax embraces the power to destroy; that the power to destroy, if wielded by a different hand, is hostile to and incompatible with the power to create and preserve. The reasoning of the Court as to why the State could not tax the franchise of a corporation chartered by the United States in the exercise of a sovereign power is just as cogent and conclusive to the effect that Congress cannot tax the franchise of such a corporation when created by the exercise of sovereign power reserved to the States. Under the doctrine of this case, the Federal Government and State governments must respect each other's sovereignty within the sphere in which they are sovereign. And neither can so exercise its taxing power as to invade the sovereignty of the other, without violating the Constitution. If whatever the United States has a right to do the individual States has no right to undo, as was stated in that case, it is equally true that whatever the individual States, in the exercise of the reserved powers under the Tenth Amendment, have a right to do, the Congress of the United States has not the right to undo. There is the same repugnancy between the power of the State to create a corporation, and the power of Congress to tax its corporate franchise, because it could thus tax it out of existence, as there was declared in this case to be between the power of the State of Maryland to tax, and the power of Congress to preserve the United States branch bank in question.

In the first decision in the Pollock case, on page 584 of the official report, and 820 of the Lawyers' Edition, the learned Chief Justice used this language:

> "The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers. As the States cannot tax the

powers, the operations or the property of the United States, nor the means which they employ to carry their powers into execution; so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of the State."

In ~~Dobbins vs. Erie County Commissioners, 41 U.~~ Collector v Day supra S., ~~435, 10 L. Ed., 1032,~~ Mr. Justice Nelson said:

"The general Government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former, in its proper sphere, is supreme; but the States, within the limits of their powers not granted or, in the language of the Tenth Amendment, reserved, are as independent of the general Government as that Government, within its sphere, is independent of the States, and that the two governments are upon an equality."

On page 126, the Court said:

"And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are necessarily and for the sake of preservation exempt from taxation by the States, why are not those of the States dependent upon their reserved power, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other."

In California vs. Central Pacific Railroad Company, *supra*, the Court said that a franchise granted by Congress cannot be taxed by a State; that taxation is a burden which may be laid so heavily as to destroy the thing taxed; that the power to tax involves the power to destroy, and that it is absurd to contend that the power given to a person or

corporation by the United States may be subjected to taxation by a State when the powers emanate from and are a portion of the powers of the government that confers them, and that to tax them is repugnant to its paramount sovereignty.

In Home Insurance Company vs. New York, *supra*, the Court held that the taxation of corporate franchises had no limitation but the discretion of the taxing power; once granted that either the Federal or State Government may tax the franchises of corporations chartered by the other, without any limitation save their discretion, what becomes of their respective sovereignty?

Veazie Bank vs. Fenno, 8 Wallace, 533, 19 L. Ed., 482, is, along with the Spreckels cases, declared to be a bulwark for this enactment, and to sustain the proposition that Congress has power to tax, even out of existence, a franchise granted by a State.

The law in question laid a heavy tax upon State bank circulation: and it was claimed, and perhaps admitted, that it was in the interest of national bank circulation.

Whatever consideration is to be given to this case, the fact should not be overlooked that the matter of establishing a uniform currency was within the powers delegated to the Federal Government, and the Government claimed in this case that it had the right to prohibit what it undertook to tax under that Act, and that the degree of taxation could no be regarded by the Court. Chief Justice Chase held that the tax was not a tax of the franchise granted by the State which Congress, upon the principle of exempting the reserved powers of the State from impairment by taxation, must be held to have no authority to lay and collect. Whatever else the learned Chief Justice said in the opinion —some of which it may perhaps be respectfully suggested was not necessary to the decision of the case—he declared that under the Constitution the power to provide for the

circulation of coin is given to Congress; that Congress may constitutionally authorize the emissions of bills of credit, may make them a currency uniform in value and description, and convenient and useful for circulation; that Congress had undertaken to supply the currency for the entire country, and that it could constitutionally secure the benefit of it to the people by proper legislation, and that it might limit by suitable enactment the circulation of notes not issued under its own authority, and that without this power its attempts to secure a sound and uniform currency for the country would be futile; and a majority court held the tax constitutional.

We submit that it is clear enough that it was so held, because it was within the power of Congress to control the subject of currency, and within its power to prohibit the circulation, as money, of notes issued by the State banks. Even then, two of the most eminent and learned justices upon the Bench dissented, on the ground that the tax was laid for the purpose of destroying the franchise granted by the State.

Mr. Justice Nelson said, in referring to the cases of United States Bank vs. Planters' Bank of Georgia, 9 Wheat., 904, and Osborne vs. United States Bank, 9 Wheat., 738, that down to that time the question had been, not whether the State banks were constitutional institutions, but whether Congress had power conferred on it to establish national banks, which question was closed by the case of McCulloch vs. Maryland, and he said the constitutionality of State banks came directly before the Court in the case of Briscoe vs. Bank of Kentucky, 11 Peters, 257, wherein the Court held, after full consideration, that the States possessed the power to grant charters to State banks; that the power was incident to sovereignty and that there was no limit under the Constitution on its exercise by the State.

It seems to us that we may derive from this case, whether we consider the majority or minority opinion, one very correct conclusion, and that is, that a tax so laid that it may destroy the institution, to wit: the corporation created by the State, is in derogation of the powers reserved to the State. The fact that Congress, in its right to provide a uniform currency, saw fit, under the assertion of the powers granted to the general Government by the States, to enact such laws as would practically make it impossible for the State banks to maintain a circulating medium, which law was sustained by the majority opinion in this case, does not, we think, when rightfully considered, furnish any authority for the general assertion of the right to tax the franchises of the corporation or to lay a destructive burden thereon.

Suppose the question of circulating medium, bills of credit, and so forth, not to be involved, and Congress should pass an act levying a tax either upon the franchise to be a State bank or the right to exercise such franchise, and to make it so burdensome that it would be impossible to operate such a bank; then we would have a case where the question of the right to destroy the creations of the States under their reserved power by taxing act of Congress would be sharpened to the testing point. Will it be claimed that Veazie Bank vs. Fenno furnishes authority for the assertion of such power? It must be so claimed if it is to be relied upon as authority to support the law of 1909.

The claim has been made by some of the sponsors for this law that it is only in respect to the exercise of a governmental function that the protection of the Tenth Amendment applies to prevent the impairment of the sovereign powers reserved to the States. We submit, first, that no such distinction is permissible either on reason or authority, and that to assert a power wielded by a different hand, which may be destructive of the constitutional creations of

the State, is an infringement upon the rights of the State reserved under the Tenth Amendment; and, second, that to destroy or impair the conceded rights of the States to charter corporations and preserve and maintain them by the exercise of their reserve powers is, in effect, to cripple the States and impair their revenues for the maintenance of the State government, and to interfere with the States in what they deem and have a right to determine for themselves to be proper instrumentalities for the development of the resources of the State.

No argument can be made for the inhibition of the Constitution upon the States against taxing corporate franchises granted within the constitutional power of the general Government that does not apply upon both reason and authority to prevent the wielding of like destructive power by Congress, through the means of a corporation tax levied upon franchises of corporations created by States through the exercise of their reserved sovereign powers. This doctrine does not prevent the States from taxing the property of Federal corporations within their domains; nor does it prevent the general Government from levying valid, direct taxes and apportioning the same, of which corporations, as well as individuals, must bear their just share; nor does it prevent the levying of valid excise taxes in accordance with the constitutional requirement of uniformity, which must fall on corporations as well as individuals and parnerships.

The construction we contend for gives to each government just what the Constitution provided, but refuses to sanction attempts upon the part of either government, through those for the time controlling it, to infringe upon or dissolve or annihilate the constitutional rights and powers of the other.

We invoke the very protection which the framers of the Constitution were careful to provide and which the States

were particular to have provided before the adoption of the Constitution. Therefore, in addition to the other grounds before urged, we submit that as a tax purely upon corporations, because they are corporations, as a tax upon corporate franchises, the law is invalid as violative of the Tenth Amendment to the Constitution.

V.

The law is unconstitutional and void for the further reason that it provides enormous and excessive penalties for failure to comply therewith, intended to operate to prevent parties taxed from contesting the validity of the law, and to coerce compliance therewith. And for these reasons, as well as because of the arbitrary inequalities of the law, the act denies to the corporations taxed the equal protection of laws, contrary to Section 1 of Article XIV of the Amendments to the Constitution.

It further operates to deprive such corporations of their property, without due process of law, contrary to Article V of the Amendments to the Constitution; and contravenes Article VIII of the amendment which provides that excessive fines shall not be imposed.

We shall not argue these at length. We submit, however, as it has been submitted to this Court before, that the requirement of the Fourteenth Amendment is as binding upon the general Government as upon the States, and that any law of Congress that denies equal protection is as violative of the Constitution as though enacted by a State; that a law which abrogates the principle of equality must find constitutional support therefor, and that such constitutional authority is wanting. That when it not only contains glaring inequalities, but undertakes to coerce compliance by the fixing of a penalty of not less than one thousand dollars, nor more than ten thousand dollars, with a fifty per cent

addition to the tax for failure to file a return and expose the private affairs of a corporation to examination as public records, the law not only denies equal protection, but operates to deprive parties of their property without due process of law, and ignores the provision that excessive fines shall not be imposed.

"Due process of law" is a term neither as narrow nor as broad as the meanings which the public sometimes give to it, imply. It is not limited to Court proceedings; it does not necessarily require proceedings in Court at all. It seems to have originated in Magna Charta. Mr. Cooley defines it as follows:

> "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class to which the one in question belongs."
>
> Cooley on Constitutional Limitations, 6th Edition, page 434.

In Harding vs. The People, 160 Ill., 459; 32 L. R. A., 445, the Court said that the phrases "due process of law" and "law of the land" are synonymous and refer to general public law operating upon all alike, and not to such as singles out for regulation, without reason, particular persons or classes. It is held universally to apply to corporations as well as individuals, because it is said the property of a corporation is in fact the property of its stockholders, and to deprive the corporation or to burden it is, in fact, to deprive the stockholders of their property or lessen its value.

The provision is intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. Columbia Bank vs. Okeley, 4 Wheat., 244.

If process of law is due only when it operates with equality and in accordance with the established principles of private rights and distributive justice, laws must so operate, or they are violative of the constitutional provision and, as well, violative of the provisions of Article XIV, relative to equal protection of the law. As relates to taxation, taxes should apply equally, impartially and uniformly upon all similarly situated. Absolute and perfect equality may not be attainable, but glaring and intentional discriminations have no constitutional sanction. The spirit of the entire instrument and the fundamental principles of a free government, cry out against such a law.

This constitutional provision and similar ones under State constitutions have received judicial consideration in hundreds of cases as applied to various subjects involving life, liberty and property, including taxation and the taking of private property for public use, etc. And we submit, under the interpretations given, that laws which do not operate equally and impartially as above stated are without judicial support.

May we here quote the language of Mr. Justice Field, relative to unequal taxation in California, used by him in the decision in the San Bernardino case, 118 U. S., at page 423, and page 127 of Book 30, Lawyers' Edition, where he said:

> "The question is whether it (the State) may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is one of transcendent importance, and it will come here and continue to come until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws, and that necessarily implies freedom from the imposition of unequal burdens under the same conditions."

We believe it has been laid down by the best text writers, including Mr. Cooley, that the requirement of approximate equality inheres in the very nature of the power to tax, even though not declared by written constitution; but we submit that such approximate equality is required by the provisions of the Constitution now under consideration.

We have pointed out under previous sub-divisions some of the glaring inequalities of this law. We need not here reiterate them.

Relative to the coercive provisions of the law, providing for enormous fines and penalties for failure to comply therewith, that question has so recently been before this Court, in the case of Edward T. Young, 209 U. S., 123; 52 L. Ed., 714 (in which elaborate briefs were before the Court), that we will not enlarge upon it here. This Court held, in that case, that a law which fixed penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates fixed by it, is unconstitutional as depriving the corporations of the equal protection of the laws.

A somewhat similar law was before the Court in the case of Hunter vs. Wood, reported immediately following in the same volume.

We submit, upon all the grounds urged, that the judgment appealed from should be reversed.

JED. L. WASHBURN,
Solicitor for Appellant,
709 Lonsdale Bldg., Duluth, Minn.

WILLIAM B. BAILEY,
OSCAR MITCHELL,
Of Counsel.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 648.

WILLIAM P. BUTLER, ALBERT W. DURAND, AND HOWARD H. WILLIAMS, APPELLANTS,

vs.

NEW YORK LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

(22,042)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 816.

WILLIAM F. FLUHRER, ALBERT W. DURAND, AND HOWARD H. WILLIAMS, APPELLANTS,

vs.

NEW YORK LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 3, 1910.

1 Circuit Court of the United States for the Southern District of New York. In Equity.

WILLIAM F. FLUHRER, ALBERT W. DURAND, and HOWARD H. WILLIAMS, Complainants,
against
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of New York, Sitting in Equity:

William F. Fluhrer and Albert W. Durand, citizens of the State of New York and residents of the City of New York in said State, and Howard H. Williams, a citizen of the State of New Jersey and a resident of Plainfield in said State, bring this their bill of complaint, in behalf of themselves and all other policy holders who are similarly situated and who shall be entitled to avail themselves of the benefit of this suit, against the New York Life Insurance Company, a corporation organized under laws of the State of New York, located and having its principal place of business in the City of New York in the Southern District of New York in such State, and a citizen thereof, and thereupon your orators complain and say:

First. Your orators show as follows:

1. That the New York Life Insurance Company hereby made defendant herein is a corporation without any capital stock, created a corporate entity and now existing under and by virtue of a Charter duly granted by special Act of the Legislature of the State
2 of New York in the year 1841, and is, by such Charter and by the Acts amendatory thereof, vested with certain corporate powers which are duly exercised by the defendant as a mutual life insurance company under the conditions, requirements, supervision and control, prescribed by the Insurance Law of said State.

2. That all of the assets of defendant and all income by it received, are acquired, invested, reserved, and held for the sole benefit and protection of the holders of policy and annuity contracts issued by defendant upon the conditions in said Insurance Law prescribed, and such assets and income are paid and distributed to such holders, at the times, in the proportions, and by the methods, in such conditions of said Insurance Law fixed and determined.

Second. Your orators further show as follows:

1. That each of them is a policy holder of said defendant, owning and holding in his own name and right, policies described as follows:

William F. Fluhrer; Policy No. 614,576; issued by defendant on June 11, 1894; for the sum of $12,500.

Albert W. Durand; Policy No. 574,551; issued by defendant on December 22, 1896; for the sum of $5,000.

Howard H. Williams; Policy No. 579,442; issued by defendant on December 20, 1893; for the sum of $5,000.

Howard H. Williams; Policy No. 751,886; issued by defendant on October 6, 1896; for the sum of $1,000.

Howard H. Williams; Policy No. 3,712,395; issued by defendant on May 10, 1905; for the sum of $2,000;

and that said defendant in addition to the policies of your orators has outstanding approximately 981,590 policies of the approximate face value of $2,002,809,227, and this suit is for an object common to them all. Your orators therefore bring this suit in their own names and in their own behalf as policy holders in said de-
3 fendant company, and also as the representatives and on behalf of such of the other policy holders similarly situated and interested as may choose to intervene and become parties hereto.

2. That they are informed and believe that at the close of business on the 31st day of December, 1909, the assets of defendant exceeded the sum of $599,000,000, and that the full market value of the Government, State, and Municipal Bonds duly issued in this and other countries, which constituted a portion of such assets, was $77,015,254, and included in such amount were Bonds issued by the United States Government due in 1925 of the market value of $1,150,000; Bonds of the State of Massachusetts of a market value in excess of the sum of $4,200,000; Bonds of the City of New York of a market value of a sum in excess of $7,000,000; all of which Bonds are, as your orators are informed and believe, issued pursuant to lawful provisions exempting them from taxation for all purposes.

3. That included in the assets of the defendant as above stated are various parcels of real estate of the aggregate value as shown by the books of said defendant, of $11,718,000, from which said defendant receives an annual income in excess of the sum of $526,000 over and above all taxes, repairs, and expenses of maintenance thereof; of which real estate various parcels, having an aggregate value of over $2,500,000, are located in foreign countries, namely, France, Prussia, Austria, Holland and Servia.

4. That said defendant is engaged in the business of writing life insurance all over the civilized world, and approximately one-quarter of all its business is derived from foreign countries in no way under the jurisdiction of the United States of America or any of its Colonies or dependencies.

5. That under the law of New York there is no distinction
4 in substance between the methods of holding and preserving the assets of the defendant for the benefit of its policy-holders, and the methods employed by savings banks and benefit associations in holding their assets for depositors and members respectively, in that all assets are held for the benefit of the policy-holders, depositors, and members thereof, and all such corporations make no profits from the ownership of such assets for all surplus earnings must be apportioned for the benefit of such policy-holders, depositors, and members, and are the property of the same when so apportioned.

6. That many foreign and domestic corporations do business in the United States of America along lines similar to those pursued by

fendant, and the amount of business varies in the case of each rporation so that the exemption, provided in the statute herein- ter mentioned, of $5,000 forms a widely different proportion to the et income of such corporations, depending on the aggregate amount ereof.

Third. Your orators further show as follows:

1. That they are informed and believe that, in alleged compliance ith the requirements of an Act of Congress of the United States ntitled "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," passed ugust 5, 1909, and having in view the penalties imposed by such ct and by the laws of the United States relating to the collection of nternal revenue taxes, defendant proposes to make and file with the ollector of Internal Revenue of the Second District of the City of ew York, on or before March 1, 1910, a return in the form pre-
scribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, showing the amount of net income received by defendant during the year 909, computed as in such Act prescribed and including in the in- ome upon which such computation is made the income derived rom said Bonds of the United States, the State of Massachusetts, nd the City of New York, and defendant claims and asserts that nder and by virtue of the alleged authority and requirements of such Act of Congress it is required and intends to pay to such Col- lector on or before June 1, 1910, a tax of One per centum on the net income of defendant for the year 1909, computed as aforesaid.

2. That they are informed and believe that the net income of de- fendant for the year 1909 is in excess of $10,000,000, computing the same as in said Act of Congress prescribed, as follows:

Deducting from the gross amount of the income of defendant all its ordinary and necessary expenses actually paid within the year out of the income in the maintenance and operation of its business, including all charges such as rentals or franchise payments, and all losses actually sustained within the year and not compensated by insurance or otherwise; together with the sums other than dividends paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to re- serve funds; together with all other deductions allowed by said Act of Congress.

Fourth.

1. Your orators further show that the provisions of said cor-
poration tax contained in said Act of Congress are unconstitu- tional, null and void, in that the said tax is a direct tax in respect of the real estate held and owned by said defendant in its own right, which direct tax is not in and by said Act appor- tioned among the several States as required by Section 2 of Article 1 of the Constitution of the United States.

2. Your orators further aver that if the said corporation tax so incorporated in said Act of Congress be held not to be a direct tax, then its provisions are nevertheless unconstitutional, null and void, in that they are not uniform throughout the United States as re-

quired in and by Section 8 of Article I of the Constitution of the United States.

3. Your orators further aver that the said corporation tax is not uniform as to property, class or subject in that, as they are informed and verily believe, the net profits or income above actual operating and business expenses of many labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders and associations, domestic building and loan associations, amount to more than $5,000 per annum, but such Act creates an artificial distinction between such corporations and defendant herein, which is a mutual insurance company having no capital and dividing all its profits among its policy holders, and said tax by such Act is imposed upon the defendant and other mutual insurance companies but is not imposed upon the other corporations described in this paragraph, nor upon mutual savings banks, although in Massachusetts mutual savings banks are authorized by the Acts of 1907, Chapter 561, to establish and maintain mutual insurance departments on conditions in all essentials like those governing the business of said defendant.

4. Your orators further aver that the said corporation tax is not uniform in that, as they are informed and verily believe, it is
7 imposed upon a very small minority of the corporations of the United States, namely those which have net profits in excess of $5,000 per annum; that the remaining corporations, comprising the great majority of the corporations of the United States, are by such Act exempted from the payment of said tax although they hold in the aggregate the greater portion of all corporate property in the United States.

5. Your orators further aver that said corporation tax is not uniform as required by Section 8 of Article I of the Constitution of the United States in many other respects beside those specifically mentioned in this bill of complaint, and that its provisions are therefore unconstitutional and void.

6. Your orators further aver that the said provisions of such corporation tax are likewise unconstitutional, null and void, in that they impose a tax upon income not taxable under the Constitution of the United States, and likewise income derived from the stocks and bonds of the United States and of the several states, counties and municipalities therein, which stocks and bonds are among the means and instrumentalities employed for carrying on their respective governments, and are not proper subjects of the taxing power of Congress; and as regards the stocks and bonds of the states, counties and municipalities, such corporations are distinct from the general government of the United States and their respective stocks or bonds are exempt from Federal taxation.

7. Your orators further aver that the provisions of said tax are unconstitutional, null and void, in that they impair property rights vested prior to the passage of said Act, and in that they im-
8 pose a tax upon the net profits of corporations which accrued prior to August 5, 1909, the date upon which such Act became a law, as well as upon profits received after such date.

8. Your orators further aver that the provisions of said corporation tax are unconstitutional, null and void, in that all corporations hereby taxed may, under and by virtue of its terms and provisions, be deprived of their property without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

9. Your orators further aver that the provisions of said corporation tax are unconstitutional, null and void, in that all corporations hereby taxed may be compelled to produce and disclose their private books and papers in order to make them liable for the penalty or forfeit their property in violation of Articles IV and V of the Amendments to the Constitution of the United States.

10. Your orators further show that this suit is not collusive to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

11. Your orators further show that if the defendant pays such tax out of its surplus earnings or net income, it will thereby diminish its assets, decrease the amounts which the policy-holders are entitled to receive as dividends or in reduction of the premiums upon their policies and lessen the value of all such policies to the holders thereof, with the result that such tax is a direct tax upon said policy-holders.

12. Your orators further show that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of in-
9 terest and costs, the sum or value of $5,000, and that it arises under the Constitution and Internal Revenue laws of the United States.

All of which actings, doings and pretenses of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orators in the premises.

Wherefore, and in consideration whereof, and forasmuch as your orators are remediless in the premises at and by the strict rules of the common law, and are relievable only in a court of equity, where matters of this nature are properly cognizable and relievable:

Yours orators pray:—

1. That it may be adjudged and decreed that the said provisions known as the corporation tax incorporated in said Act of Congress enacted August 5, 1909, are unconstitutional, null and void.

2. That the defendant be restrained from voluntarily complying with the provisions of said act and making the lists, returns and statements above referred to or paying the tax aforesaid.

3. And that your orators may have such other or further or different relief in the premises as to a court of equity may seem meet.

To the end therefore, that the said defendant may, if it can, show why your orators should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the best and utmost of its knowledge, remembrance, information
10 and belief, under its corporate seal and not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated,

paragraph by paragraph, and it were specially interrogated thereunto; may it please your Honors to grant unto your orators a subpœna ad respondendum issuing out of and under the seal of this honorable court, to be directed to the said defendant the New York Life Insurance Company, commanding it on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and, further, to perform and abide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orators, as in duty bound, will ever pray, etc.

CHAS. HOWARD WILLIAMS,
Solicitor and of Counsel for Complainants,
31 *Nassau Street, New York City.*

11 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Howard H. Williams, being duly sworn, says: I am one of the complainants above named. I have read the foregoing bill of complaint and know the contents thereof. The statements therein made are true of my own knowledge, except those alleged on information and belief, and as to those I believe them to be true. The sources of my information and grounds of my belief are the statements of its affairs, made by the defendant after the close of its business for the year 1909.

HOWARD H. WILLIAMS.

Subscribed and sworn to before me this 18th day of February, 1910.

[SEAL.] HERBERT SCHUBERT,
Notary Public, Richmond County.

Certificate filed in New York County.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 18, 1910, John A. Shields, Clerk.

12 *Demurrer.*

In the Circuit Court of the United States for the Southern District of New York.

Docket 5. No. 182.

WILLIAM F. FLUHRER, ALBERT W. DURAND, and HOWARD H. WILLIAMS, Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY, Defendant.

Demurrer of the Above-named Defendant to the Bill of Complaint of the Above-named Plaintiffs.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill, and for causes of demurrer showeth,

That it appeareth by the plaintiffs' own showing by their said bill that said plaintiffs are not entitled to the relief prayed by the bill against this defendant.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant doth demur thereto. And it prays the judgment of this Honorable Court, whether said defendant shall be compelled to make any answer to the said bill; and said

13 defendant humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

JAMES H. McINTOSH,
Solicitor for Defendant, 346 Broadway, New York.

JAMES H. McINTOSH,
Of Counsel.

I hereby certify that the foregoing demurrer is in my opinion well-founded in point of law.

JAMES H. McINTOSH,
Of Counsel for Defendant.

STATE, COUNTY, AND CITY OF NEW YORK,
Southern District of New York, ss:

John C. McCall, of lawful age, being first duly sworn, deposes and says, that the defendant in the above entitled action is a corporation; that he is 2nd Vice-Pres. of said corporation and authorized to make this verification and that the foregoing demurrer is not interposed for delay.

JOHN C. McCALL.

Subscribed in my presence and sworn to before me this 23rd day of February, 1910.

[NOTARIAL SEAL.] RALPH FREEMAN,
Notary Public.

14 (Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 23, 1910, John A. Shields, Clerk.

15 *Final Decree Sustaining Demurrer and Allowance of Appeal.*

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, Held at the United States Post Office and Court House Building, in the City of New York, this 23 Day of February, 1910.

Present: Hon. Walter C. Noyes, Circuit Judge.

WILLIAM F. FLUHRER, ALBERT W. DURAND, and HOWARD H. WILLIAMS, Complainants,
against
NEW YORK LIFE INSURANCE COMPANY, Defendant.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having been heard in support of said demurrer and in opposition thereto, it is by the Court now here

Ordered and decreed that the said demurrer be sustained, and that the bill of complaint of the complainants above named be, and the same is hereby, dismissed with costs.

WALTER C. NOYES, *C. J.*,
United States Circuit Judge.

Thereupon the above named complainants state that in this case the constitutionality of a law of the United States is drawn in question and in open court pray an appeal from said final decree direct to the Supreme Court of the United States pursuant to the statutes in such case made and provided. It is therefore further

Ordered that the said appeal be, and the same is hereby,
16 allowed as prayed for in open court, the defendant waiving any bond.

The said defendant then admitted in open court due notice of the said appeal and duly waived service of any citation thereon.

WALTER C. NOYES, *C. J.*,
United States Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 23, 1910, John A. Shields, Clerk.

17 *Assignment of Errors.*

Circuit Court of the United States for the Southern District of New York.

In Equity.

WILLIAM F. FLUHRER, ALBERT W. DURAND, and HOWARD H. WILLIAMS, Complainants,
against
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Assignment of Errors.

And now come the complainants above named, by Charles Howard Williams, their solicitor, and, in connection with the complainants' petition of appeal from the final decree made and entered herein on the 23 day of February, 1910, dismissing the complainants' bill of complaint with costs, make and file the following assignment of errors in pursuance of the statute and rule in such case made and provided.

I.

That the Court erred in not holding that so much of the Act of Congress of the United States entitled "An Act to Provide Revenue, "Equalize Duties, and Encourage the Industries of the United States, "and For Other Purposes," passed August 5, 1909, as relates to the levying and collection of a tax upon the income of corporations, as specified in Section 38, was unconstitutional and void, in that such Section violates Sections 2 and 8 of Article I., and Articles IV. and V. of the Amendments to the Constitution of the United States.

II.

That the Court erred in not granting to the complainants the relief prayed in and by their bill or any part thereof.

18 III.

That the Court erred in sustaining the demurrer to said bill.

IV.

That the Court erred in dismissing the said bill with costs.

Dated New York Feb. 23, 1910.

CHARLES HOWARD WILLIAMS,
Solicitor for Complainants, 31 *Nassau Street, New York City.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 23, 1910, John A. Shields, Clerk.

19 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to nineteen inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled William F. Fluhrer, Albert W. Durand and Howard H. Williams, Complainants-Appellants, against New York Life Insurance Company, Defendant-Appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of February, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal United States Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk*.

[Endorsed:] United States Supreme Court. William F. Fluhrer et al. Compl'ts-Appellants, vs. New York Life Insurance Company, Def't-Appellee. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,042. S. New York C. C. U. S. Term No. 816. William F. Fluhrer, Albert W. Durand, and Howard H. Williams, appellants, vs. New York Life Insurance Company. Filed February 26th, 1910. File No. 22,042.

~~456~~ 456

Supreme Court

OF THE UNITED STATES.

WILLIAM F. FLUHRER, ALBERT W. DURAND and HOWARD H. WILLIAMS, Complainants-Appellants, against NEW YORK LIFE INSURANCE COMPANY, Defendant-Appellee.	MOTION TO ADVANCE THE CAUSE FOR HEARING.

And now come the above named appellants and move that this cause be advanced for hearing and assigned for argument on March 14, 1910, for the following reasons:

This cause, as appears by the transcript of the record already on file herein, involves the constitutionality of Section 38 of the Act of August 5, 1909, which Section is known as the "Corporation Tax Law." Other cases involving similar issues have been already assigned for the day named, and it seems proper to the appellants that this cause should be argued on the same day in order that the Court may have before it at the time of the argu-

ment all the different phases of the operation of such law.

The present case differs, as the appellants are informed and believe, from each and every other cause now before the Court in certain essential particulars.

1. The defendant is a mutual insurance company, having no capital stock and no shares of any character. By law all its surplus earnings of every kind are apportioned to the policyholders equitably. The appellants contend that the Corporation Tax is as to them a direct tax upon the policyholders and is therefore invalid, because not levied in the manner provided by the Constitution of the United States.

2. Appellants further contend that the Corporation Tax is a direct tax upon the real and personal property of the corporation.

3. Appellants further contend that the Tax is not uniform as required by the Constitution, because defendant is a mutual company for the encouragement of savings. Nevertheless it is made subject to the Corporation Tax by the aforesaid law while mutual savings banks and beneficiary associations, having in all essential particulars the same provisions for apportionment of their surplus receipts, are exempted by such law from the payment of the Tax.

4. The defendant Company is engaged in business all over the world, and all of its profits are made subject to the Tax. The appellants therefore contend that the Tax is not uniform as required by the Constitution for the reason that foreign corporations of the same kind, doing business in the United States, are by the provisions of such law taxable

only upon that portion of their business done in the United States.

5. The defendant Insurance Company owns a large amount of Bonds issued by the Government of the United States, by several of the independent States, and by a large number of municipal corporations, as well as Bonds issued by foreign governments and foreign municipal corporations, all of which are, by the terms of the Bonds, exempt from taxation. The appellants contend that the aforesaid tax is unconstitutional for the reason that the income of such bonds is by the terms of such law made part of the net income of the defendant for the purpose of taxation, according to the provisions of such law.

6. Appellants further contend that the Tax is unconstitutional inasmuch as a provision is made in such law for requiring defendant and other corporations to furnish evidence to the Government by which the Government may enforce the penalties provided therein for failure to make the necessary return of its net income or to pay the Tax.

Inasmuch as all, or nearly all, these several points are peculiar to the present cause, appellants respectfully move this Court that the cause be advanced for argument and assigned to March 14, 1910.

Dated, New York, February 25, 1910.

CHARLES HOWARD WILLIAMS,
Solicitor and of Counsel,
for Appellants,
31 Nassau Street,
New York.

3355

Supreme Court, U. S.
FILED
MAR 12 1910
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States

No. 456 October Term, 1909

WILLIAM F. FLUHRER, et al,

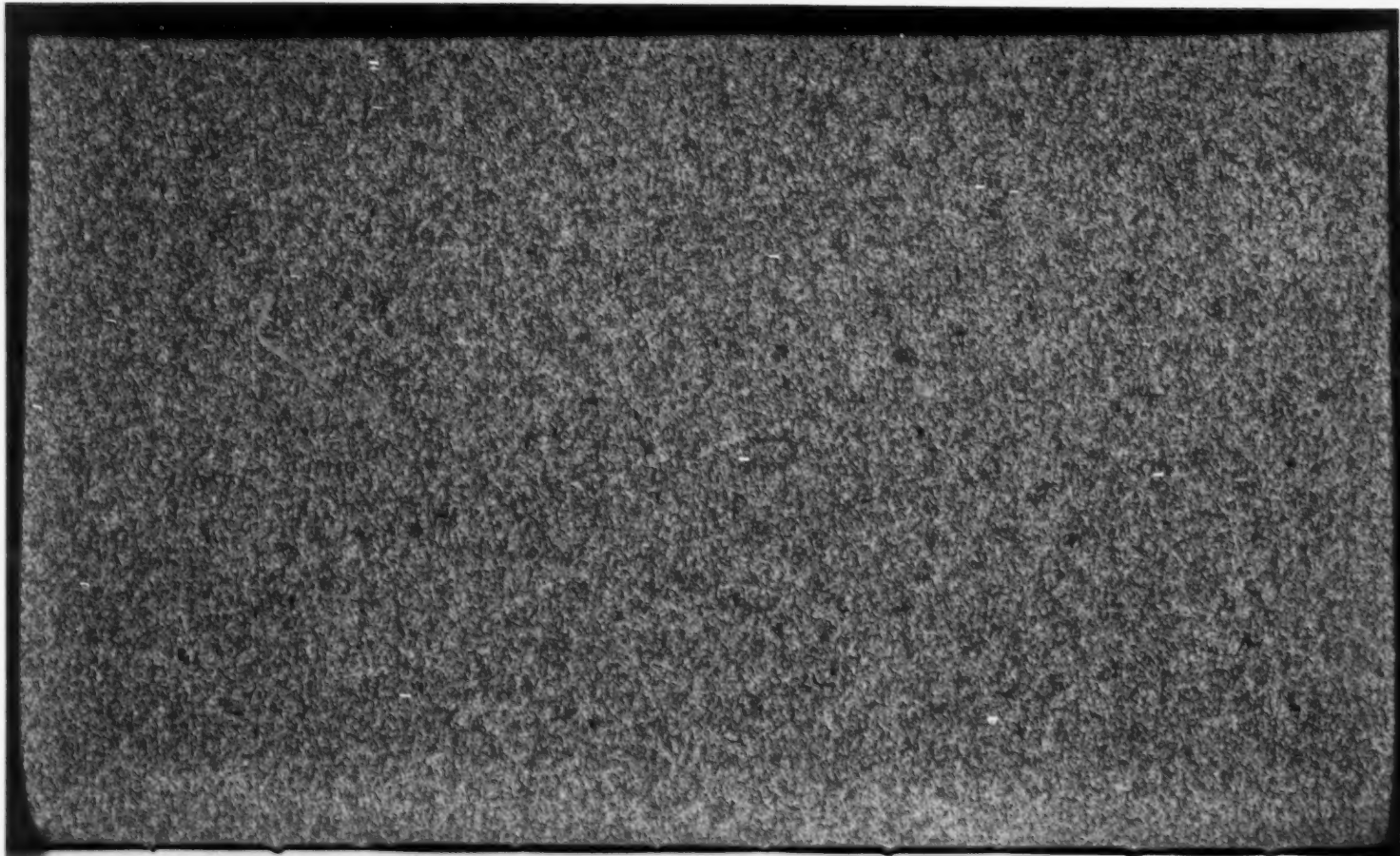
Appellants.

vs.

NEW YORK LIFE INSURANCE COMPANY.

BRIEF OF APPELLANTS.

C. H. WILLIAMS,
Of Counsel.



Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 816.

WILLIAM F. FLUHRER, and others,
Complainants-Appellants,

against

NEW YORK LIFE INSURANCE COMPANY,
Defendant-Appellee.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

This case comes before the Court upon an appeal taken from the decree of the United States Circuit Court for the Southern District of New York sustaining a demurrer to the bill, filed by the complainants who hold policies issued by the defendant, on behalf of themselves and all other policy holders similarly situated, for the purpose of restraining the defendant from making a return of its income and paying a tax thereon pursuant to the provisions of Section 38 of the Act of August 5, 1909, which Section is known as the "Corporation Tax Law."

The bill sets forth certain facts, as follows:

The defendant is a corporation without any capital stock, organized under a Special Act of the Legislature of the State of New York in 1841, and is vested with certain corporate powers as a mutual life insurance company, operating solely

under the supervision and control prescribed by the Insurance Law of said State.

All of defendant's assets and all its income are acquired, invested, reserved and held for the sole benefit and protection of the holders of policy and annuity contracts issued by it, and such assets and income are paid and distributed to its policy holders as in such Insurance Law prescribed. Defendant has outstanding approximately 981,590 policies, of an approximate face value of $2,002,809,227, and this suit is for an object common to them all. At the close of business on December 31, 1909, the assets of the defendant exceeded the sum of $599,000,000. Among such assets were included bonds of the United States Government, various States, and Municipalities of the aggregate market value of $77,015,254, of which United States Government bonds are of the value of $1,150,000, bonds of the State of Massachusetts, $4,200,000, and bonds of the City of New York $7,000,000. All of the bonds so held were issued pursuant to lawful provisions exempting them from taxation for all purposes.

Furthermore, defendant owned at that date various parcels of real estate of the aggregate value of $11,718,000, from which it received an annual income in excess of $526,000 over and above all taxes, repairs and expenses of maintenance. Of this real estate various parcels having an aggregate value of over $2,400,000 are located in foreign countries, namely, France, Prussia, Austria, Holland and Servia. Defendant is engaged in the business of writing insurance all over the civilized world and approximately one-quarter of its business is derived from foreign countries in no way under the jurisdiction of the United States.

Under the law of New York, there is no distinction in substance between the methods of holding and preserving the assets of the defendant for the

benefit of its policy holders and the methods employed by savings banks and benefit associations, in holding their assets for depositors and members respectively, in that all assets are held by such institutions for the sole benefit of the policy holders, depositors and members, and the corporations themselves make no profits from the ownership, of such assets, by reason of the law which prescribes that all surplus earnings must be apportioned yearly for the benefit of the policy holders, depositors and members and are the property of the same when so apportioned.

Many domestic and foreign corporations do business in the United States on lines similar to those pursued by the defendant, the amount of the business varying in each case, so that the exemption provided in the Statute above mentioned forms a widely different proportion to the net income of such corporations.

Defendant proposes to make and file with the Collector of Internal Revenue in the City of New York a return in the form prescribed by the Commissioner of Internal Revenue in compliance with the requirements of the said Act, and defendant intends to include in the income upon which such computation is made the income derived from said bonds of the United States, the State of Massachusetts and the City of New York, and defendant claims that by virtue of the alleged authority and requirements of such Act it is required to pay, and it intends to pay, to said Collector on or before June 30, 1910, a tax of One Per Cent (1%) on its net income for the year 1909, computed as aforesaid.

The net income of defendant for the year 1909 is in excess of $10,000,000, computing the same as in such Act prescribed.

The bill then charges that the provisions of said Act for a corporation tax are unconstitutional, null and void, in that the said tax is a direct tax

in respect of the real estate held and owned by defendant in its own right, which tax is not in and by said Act apportioned among the several States, as required by Section 2 of Article I, of the Constitution; and also that if the tax is not held to be a direct tax its provisions are nevertheless unconconstitutional, because they are not uniform throughout the United States, as required by Section 8 of Article I of the Constitution.

The bill charges further that the tax is not uniform as to property, class, or subject because the net income above actual operating and business expenses of many labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders and associations, and domestic building and loan associations, amounts to more than $5,000 per annum, and said Act creates an artificial distinction between such corporations and the defendant, and that said Tax is imposed upon defendant and other mutual insurance companies but is not imposed upon the other corporations so named, nor upon mutual savings banks, although in Massachusetts by a Statute enacted in the year 1907 mutual savings banks are authorized to issue life insurance policies upon terms and under conditions substantially similar to those controlling the business of the defendant by the law of New York.

The complainants further charge the tax to be unconstitutional because it is imposed upon a small minority of the corporations of the United States, namely those which have profits in excess of $5,000 per annum, and that the remaining corporations comprising the great majority of those in the United States are exempted from payment of the tax, although they hold in the aggregate the greater part of all corporate property.

Again, it is claimed that the provisions of the corporation tax are unconstitutional, because the tax is imposed upon income not taxable under the

Constitution of the United States, being derived from bonds of the United States, of the several States, Counties and Municipalities thereof.

Again it is claimed that the tax is unconstitutional, because all the corporations thereby taxed may, under and by virtue of its provisions, be deprived of their property without due process of law, in violation of Article V of the Amendments of the Constitution.

The complainants then allege the tax is also unconstitutional because all corporations thereby taxed may be compelled to produce and disclose their private books and papres in order to make them liable for the penalty or forfeit their property, in violation of Articles IV and V of the Amendments to the Constituion.

Fnally, it is stated that the suit is not collusive; that if the defendant pay such tax it will diminish its assets, decrease the amounts which the policy holders are entitled to receive and lessen the value of all such policies; with the result that such tax is a direct tax upon the policy holders.

The bill concludes with the statement that this is a suit of a civil nature in equity, and that the matter in dispute exceeds, exclusive of interest and costs, the sum of $5,000, and that it arises under the Constitution and Internal Revenue Laws of the United States, and complainants pray that it may be adjudged and decreed that the provisions of Section 38 of the Act are unconstiutional, and that the defendant be restrained from voluntarily complying with the provisions thereof.

The defendant demurred on the ground of want equity and the bill was dismissed with costs, whereupon the record recited that the constitutionality of a law of the United States was drawn in question and an appeal was allowed directly to this Court.

Assignment of Errors.

Complainants assign as error that the Court erred in not holding the Act mentioned unconstitutional in that it violates Sections 2 and 8 of Article I of the Constitution, and Articles IV and V of the Amendments thereof.

I.

The tax imposed by the Act of 1909 considered as an income tax is void.

1. The law of 1909 differs from the law of 1894 only as follows:

a. By exempting all individuals.

b. By imposing a tax on domestic mutual insurance corporations and upon the business in the United States of like foreign corporations.

c. By including the income derived from government bonds, otherwise exempt.

d. By increasing the amount of net income exempted from $4,000 to $5,000.

e. By reducing the rate of tax from 2% to 1%.

2. The tax of 1909, as was the tax of 1894, is an attempt to levy a tax upon income derived from real estate and personal property, including State and Municipal bonds otherwise exempt, and is imposed without apportionment.

It is respectfully submitted that what this Court held in the Pollock case to be invalid under the Act of 1894, applies to that which is identical in principle under the Act of 1909, and the invalidity thereof is thereby established.

It is an established rule of constitutional construction that "the *judiciary will not regard mere "forms, but will look through the forms to the sub-"stance of things.*" Such is the language of Mr. Justice Harlan in the recent decision of Western

Union Tel. Co. v. Kansas, 216 U. S., 1, at page 27.
Citing

Henderson v. Kansas, 92 U. S., 259, 268;

Mugler v. Kansas, 123 U. S., 623, 661;

Lyng v. Michigan, 135 U. S., 161, 166;

Robbins v. Shelby Tax Dist., 120 U. S., 489, 497;

Minnesota v. Barber, 136 U. S., 313, 319, 326.

To exactly the same effect is the statement of Mr. Justice Moody in Home Savings Bank v. Des Moines, 205 U. S., where, at page 510, he says: "*But the true interpretation of the law cannot "rest upon a single phrase* in it. *All its parts "must be considered* in the manner pursued by this "Court in New Orleans v. Houston, 119 U. S., 265, 278, and Home Ins. Co., v. New York, 134 U. S., 594, *with a view of determining the end accomplished* by the taxation, *and its actual and substantial purpose and effect.*"

Under this principle therefore it is clear that the phraseology of the law "*a special excise tax with re-"spect to the carrying on or doing business,*" etc., will not avail if the actual end and effect of the law is the taxation of corporate income in violation of constitutional limitation.

It is appropriate to cite here the *Bank Tax Case*, 2 Wall, 200, holding that a State might not tax indirectly, in the "*measured by*" method, what it could not tax directly.

So in *Home Bank v. Des Moines*, 205 U. S., 515, the Court in reaffirming the doctrine of Federal immunity from State taxation, declined to find a distinction between a tax on Federal securities and the capital invested in such securities.

Citing Bank Tax Cases and

Weston v. Charleston;

O. N. Bk. v. Owensboro, 173 U. S., 664.

If a tax on gross receipts, *not even disguised as an occupation tax*, is not helped out by its being *measured* by or *equal* to a definite percentage, the same rule would seem to govern a tax with such a disguise. For the disguise is but a thin and transparent device disclosing the old, unlawful, unapportioned income tax. And there is not even a "slight concealment."

Home Bk. v. Des Moines, 205 U. S., 515.

If the Government needs an income tax why not have one in the constitutional way? Because it would be unpopular is the only adequate answer.

It seems to need no further argument that the present corporation tax is a direct tax upon the real and personal property held by the defendant for its policy holders, and also upon the Government, State and Municipal bonds owned by it. The tax is therefore invalid, not being apportioned according to population.

The "actual effect" is clearly manifested in the case of the present defendant. Its net income from investments is approximately $26,000,000 of which $526,000 is from real estate, about $3,000,000 from Government, State and Municipal bonds.

This case therefore falls directly under the authority of *Income Tax Cases*, 157 U. S., 429; 158 U. S., 601.

It is an attempt

1. To tax the income of State and Municipal securities.

2. Under the phraseology of an excise tax, to levy in purpose and effect, a direct tax, without apportionment, upon the rentals of real estate and the income derived by the defendant corporation generally from its investments in personal property.

Neither of which acts is within the power of Con-

gress and the law is therefore unconstitutional and void.

Inasmuch as, by an order of the Court, this appeal is to be argued with a number of other cases further citation of authorities will be made under this Point and the continuation of this brief will be directed to the application of the Act to the special facts shown in the bill.

II.

THE TAX IMPOSED UPON DEFENDANT, AS BY THE ACT OF 1909 REQUIRED, IS A DIRECT TAX AND THEREFORE VOID.

The defendant is a corporation created by the State of New York, without capital stock or shares, and exercises its corporate powers as a strictly mutual life insurance company, as in the Insurance Law of such State prescribed. In addition to the payment of its policies as they mature, defendant is bound to apportion yearly to its policy holders any surplus earned in excess of amounts reserved as by such Insurance Law prescribed. No gains or profits can be derived by defendant from such exercise of its powers. The statutory conditions upon which the powers of defendant are exercised are set forth in Chapter 28 of the Consolidated Laws of the State of New York, therein designated the Insurance Law, an extract from which is as follows:

> "Section 83. Upon the thirty-first day of "December of each year, or as soon there- "after as may be practicable, every such cor- "poration shall well and truly ascertain the "surplus earned by such corporation dur- "ing said year. After setting aside from "such surplus such sums as may be requir- "ed for the payment of authorized dividends "upon the capital stock, if any, and such "sums as may properly be held for account

"of existing deferred dividend policies and "for a contingency reserve not in excess of "the amount prescribed in this article, *every "such corporation shall apportion the re- "maining surplus equitably to all other pol- "icies entitled to share therein.* Except in "the case of a term or an industrial policy *"the share of surplus so apportioned* in the "case of a policy issued on or after the first "day of January, nineteen hundred and "seven, *shall, at the option of the owner of "the policy, be payable in cash, or shall be "applicable to the payment of any premium "or premiums upon said policy or to the "purchase of a paid-up addition thereto or "shall be permitted to accumulate to the "credit of the policy at such rate of interest "as shall be allowed by the company, and "with such interest shall be payable upon "the maturity of the policy or shall be with- "drawable in cash by the owner of the policy "on any anniversary of the date of issue "thereof.* Such corporation may require "the owner of the policy to elect the manner "in which said dividends shall be applied as "above provided by mailing a written notice "of the amount of said dividends and the "options available as aforesaid in a sealed "envelope in the manner required by the "provisions of this chapter for notices of "premium payments, and in case the owner "shall fail to notify the company in writing "of his election within three months after "the date of the mailing of said notice, the "surplus shall be applied by the company "to the purchase of a paid-up addition to "the sum insured."

Corporations of this character were expressly exempted from income tax by the Act of 1894. The

present Act, however, purports to tax mutual insurance companies, although still exempting from its provisions mutual savings banks, fraternal orders and benefit associations. This is a marked departure from the policy of earlier Acts to which Congress was doubtless led by the fact that the net earnings of mutual insurance companies are estimated to be not less than $100,000,000 a year. There is, however, a sharp distinction between such corporations and business corporations organized for gain, and the effect of this distinction must be noted. In one case all corporate property is held by the corporation for its own account, and its shareholders—although the ultimate beneficiaries—have no direct interest therein; while in a mutual life insurance company the legal relation of the policy holders to the corporation is quite different. It is well understood, and is the feature of mutual life insurance which gives to it great stability, that policy holders pay premiums in excess of the actual cost of their insurance and it is the surplus arising each year over actual cost and reserves which must be returned to the policy holders by the statutory apportionment.

It follows, then, from the application of such Insurance Law to the transactions of defendant that it is an instrumentality used by its policy holders for the sole purpose of combining and employing their savings for the mutual protection of themselves and their dependents, at the lowest possible cost and with the largest possible returns of yearly surplus, having due regard to safety, and without profit to the corporation or to the policy holders.

Such being the status of defendant it is respectfully submitted that the tax imposed upon it by the Act of 1909 is a tax measured by a surplus fixed and set apart by the law of New York for payment to the policy holders of defendant, and is therefore a direct tax upon property held by de-

fendant for such payment. Under the *Pollock* case it is also a direct tax upon so much of such surplus as is derived from the income ofreal estate andthe income of personal property, including Government, State and Municipal bonds, otherwise exempt.

Pollock v. Farmers Loan & Trust Co., 157 U. S., 429; 158 U. S., 601.

III.

AS AN EXCISE ON BUSINESS OR OCCUPATION THE TAX IMPOSED ON DEFENDANT BY THE ACT OF 1909 IS VOID, FOR REASONS AS FOLLOWS:

1. IT IS NOT UNIFORM.
2. IT IS NOT EQUAL UPON THE CLASSES ASSESSED.
3. IT TAKES PROPERTY WITHOUT DUE PROCESS OF LAW.
4. IT CREATES A FAVORED CLASS.

1. It is unquestionably within the power of Congress to levy an excise under Sec. 8 of Article I, upon the business of life insurance in which this defendant is engaged.

And such a law might well include an almost limitless variety of occupations or businesses. Any and all such excises must however, comply with two fundamental principles.

(a) They must be uniform throughout the United States.

(b) They must contain that element of equality or uniformity which is at the base of all taxation, of bearing with equal weight upon all persons of equal resources engaged in the same line of business.

Any other course means that Congress can drive whomsoever it sees fit, out of any line of activity taxable under Section 8.

And the definition and meaning of the word "excise" as it was used at the time of the adoption of

the Constitution would thereby be destroyed; for all are agreed that such a tax was considered a tax on consumption, one which could be shifted from the original manufacturer to the purchaser. Very obviously, if Congress has the constitutional power to tax industries when carried on by corporations —at the same time exempting all individuals and firms, as here—the corporations cannot shift the burden for those exempted from the tax can undersell. If Congress has the power to tax at all, in this manner it can tax at such rate as it sees fit until any or all corporations in any given line of industry are driven out of existence.

As Judge Cooley said in his work on Constitutional Limitations—p. 695:

> "Everything that may be done under the "name of taxation is not necessarily a tax; "and it may happen that an oppressive bur- "den imposed by the government, when it "comes to be carefully scrutinized, will "prove, instead of a tax, to be an unlawful "confiscation of property, unwarranted by "any principle of constitutional govern- "ment."

From these citations, it is clearly established that if Congress wishes to impose an excise on sugar refining or distilling, or life insurance, it must impose such tax, without discrimination, upon all those, whether persons, firm or corporations, who in like manner and under similar conditions engage in the particular line of business made subject to the tax.

And for the same reasons, it cannot impose an excise upon the business or occupation of all corporations engaged in a certain line of business, or as in this law in all lines of business and exempt all persons, firms or mutual associations engaged, with similar capital in similar lines of business.

Such excise is not taxation but confiscation and

is not within the constitutional powers of Congress.

In *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S., 429, this fundamental principle was recognized by all the distinguished counsel. The Attorney-General and his assistant saw fit to use illustrations, most pertinent to the present issues.

Mr. Whitney, at page 474, says "there is, however, a certain degree of uniformity involved in the very word 'tax;' a uniformity requirement involved in the definition of that word and guaranteed by the Fifth Amendment to the Constitution" ..... "*A special tax cannot be laid upon A simply because he is A and not B.* Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken."

And the Attorney-General, at page 507, reinforces this point by the assertion that "A law, for instance, providing for a tax to be paid by the light complexioned members of the community and exempting the dark, *would be unhesitatingly pronounced void as being not a use but an abuse of the taxing power.*"

Manifestly it was the intention of Congress in enacting the present law to avoid the Income Tax decision under the Act of 1894 by denominating the present tax an "Excise," for which purpose it undoubtedly relied upon the case of Spreckles S. R. Co. v. McClain, 192 U. S., 397. But that case is wholly insufficient to sustain the present law. In that case the Court evidently considered an excise tax to be a tax upon the business or occupation of the corporation assessed, and the law was valid only to the extent that the corporation so assessed was engaged in that business. The Act of 1898 applied to "every person, firm, corporation or company carrying on" the business mentioned. As an excise tax it therefore complied with the requirements of the Constitution that it should be uniform throughout the United States. The pres-

ent tax is limited to corporations and is therefore wholly wanting in the essential feature of uniformity.

The present tax is imposed by the terms of the Act on every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company engaged in business in the United States,

> "Provided, however, that nothing in this "section contained shall apply to labor, "agricultural or horticultural organiza- "tions, or to fraternal beneficiary societies, "orders, or associations operating under "lodge system, and providing for the pay- "ment of life, sick, accident, and other bene- "fits to the members of such societies, or- "ders or associations, and dependents of "such members, nor to domestic building "and loan associations, organized and oper- "ated exclusively for the mutual benefit of "their members, not to any corporation or "association organized and operated exclu- "sively for religious charitable, or educa- "tional purposes, no part of the net income "of which insures to the benefit of any "private stockholder or individual."

That the tax so levied is not a uniform excise duty would seem perfectly apparent from the phraseology of the Act itself.

It must be conceded at the outset that the tax is not an excise upon any specific occupation or profession for none is specified, and if the tax were imposed upon certain trades or occupations, to be uniform it must be levied upon persons and firms as well as upon corporations and companies.

In Knowlton v. Moore, 178 U. S., 41, it is held that the word "uniform" must be interpreted in the geographical sense. But the act of 1909 does

not comply with the requirement of uniformity as so defined.

The Statute arbitrarily exempts fraternal orders, benefit asociations, building societies, and mutual savings banks—the last named because they are not included within the definition of corporations upon which the tax is imposed.

Thus the tax is not uniform in even a single State where these various organizations transact business. Further, the tax is not uniform throughout the United States because, as the bill shows, in the State of Massachusetts mutual savings banks are authorized to write life insurance policies by Chapter 561 of the Acts of 1907. This life insurance department in savings banks is, by the provisions of such law, conducted under conditions almost identical with those governing the business of this defendant as stated above. The particular Sections of the Act establishing this fact are as follows:

Acts of 1907, Chapter 561, entitled "An Act to "Permit Savings Banks to Establish Life Insur-"ance Departments.

> "Sec. 2. Any savings bank may, upon "complying with the provisions hereinafter "set forth, establish an insurance depart-"ment."

After providing for guaranty funds, reserve, and special emergency funds the Act reads:

> "Sec. 21. * * * The balance of the net "profits shall be distributed equitably an-"nually among the holders of its policies "and annuity contracts; such distribution "to be made in the discretion of the trustees "either in cash or by addition to the "amounts payable under the policies or an-"nuity contracts."

This is a striking example of non-uniformity of

this Act throughout the United States due to this provision of Massachusetts law. It is a violation of the rules of uniformity and absolutely inequitable to tax this defendant in the State of New York and exempt corporations doing precisely the same business, on the very same conditions, in the adjoining State of Massachusetts. In the same way building and loan associations, and fraternal beneficiary societies are all operated for the benefit of their members, as is the defendant here. It is common knowledge that fraternal societies have been obliged to abandon the old assessment plan upon which they were originally organized, and now accumulate a reserve for the payment of benefits exactly as the defendant company accumulates a reserve for the payment of death losses.

Such associations when organized in New York conduct their business under the Insurance Law.

The condition described is, however, not peculiar to ~~Some~~ New York societies, for in a very recent work on the subject, Bacon on Benefit Societies, 3rd Ed., §52, it is stated:

> "It follows from the foregoing adjudica-
> "tions that all benefit societies, whether cor
> "porations or mere voluntary associations,
> "are strictly speaking, insurance organiza-
> "tions whenever, in consideration of period-
> "ical contributions, they engage to pay a
> "member, or his designated beneficiary, a
> "benefit upon the happening of a specified
> "contingency."

Citing:

> Com. v. Wetherbee, 105 Mass., 149;
> Franklin Ass'n v. Com., 10 Pa. St., 357;
> Golden Rule v. Swigert, 118 Ill., 492;
> End. Ass'n v. State, 35 Kan., 253;
> Rockold v. Society, 129 Ill., 440.

The subject of uniformity as affecting attemped exemptions of the character above described is most fully discussed in the opinoin of Mr. Justice Field in the Pollock case at page 593, where it is explained that equality is an essential element of the unifomity required so far as the same is practicable, citing U. S. v. Singer, 15 Wall, 111,121, where it is held that the excise tax upon distillers was valid because uniform in its operation. "That "is, it is assessed equally upon all manufacturers "of spirits wherever they are. The law does not es- "tablish one rule for one distiller and a different "rule for another, but the same rule for all alike."

To the same effect were the *Head Money* cases, 112 U. S.. 580, 594, decided at Circuit, 18 Fed., 135, 139. A quotation is also made from the well-known lectures of Mr. Justice Miller on the Constitution (New York, 1891), where it is said, page 241, "Different articles may be taxed at differ- "ent amounts provided the rate is uniform on the "same class everywhere, with all people, at all "times."

Applying these fundamental principles to the Act of 1909 it is plain that it does not meet these requirements. It does not extend to all corporations throughout the United States of the same class. A corporation writing life insurance in New York on certain conditions is assessed; a corporation writing life insurance in Massachusetts on conditions almost identical is exempted. And again, a corporation writing life insurance in New York is assessed if organized in a certain way and called a company, but a corporation writing life insurance in the same State, organized in a slightly different way and called the "Supreme Tent of the Knights of the Maccabees of the World." is exempted.

While not practicable in the case of the present defendant on acount of its enormous interests extending all over the world, it would be possible

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with a smaller and more recently organized company, of exactly the same character, to defeat the tax entirely by dissolving itself as an insurance company and re-incorporating, with the same members, the same assets, the same liabilities, under some fanciful title as a benefit association.

Again, it is manifest that the requirement of equality is not satisfied by the provisions of the present law. Could there be any doubt on the subject that excise taxes of this character shall be in all respects uniform and impartial, that doubt, as Mr. Justice Field stated, 157 U. S., 595, should be resolved in the interest of justice in favor of the taxpayer. It is respectfully submitted that the conclusions of the learned Justice apply with full force to the present law. Exemptions create inequalities; those not exempted bear an additional burden; a law containing arbitrary and capricious exemptions is not uniform. Under the Constitution Congress has no power, at the expense of others owning property identical in character, to sustain private corporations such as building and loan associations, savings banks, and benefit societies, which advance no purpose or public interest and exist solely for the profit of their own members. It has long been held that private enterprises cannot be aided under the pretence that it is legislative discretion to exempt an.

Loan Ass'n v. Topeka, 20 Wall., 655;
Barbour v. Louisville Bd. of Trade, 82 Ky., 645, 654-5;
Parkersburg v. Brown, 106 U. S., 487.

Cooley on Taxation, page 215, observes:

> "It is difficult to conceive of a justifiable "exemption law which should select single "individuals or corporations, or single ar- "ticles of property, and, taking them out of "the class to which they belong, make them

"the subject of capricious legislative favor. "Such favoritism could make no pretence to "equality; it would lack the semblance of "legitimate tax legislation."

None of the corporations exempted in the present Act can claim to be of a public or benevolent nature; under the law they differ in no essential characteristic in their business from the corporations that are not exempted, while, as a matter of fact, as the records of every court demonstrate many building and loan associations and benefit orders find their reason for existence rather in the compensation to be paid to their officers than in the benefits to be paid to their members. The discriminations of the law make for class legislation, yet it is the discrimination which makes this legislation possible. In one of the early cases this Court said, McCulloch v. Maryland, 4 Wheat., 316, 435: "When they (the Congress) tax char- "tered institutions of the States, they tax their "constituents; these taxes must be uniform."

Mr. Justice Field says, page 596: "Under * * * "constitutional legislation every citizen should "contribute his proportion, however small the "sum, * * * and it is no unkindness to urge any * * "to escape from their obligation. If he contributes "the smallest mite * * * he will have a greater re- "gard for the Government and more self-respect "for himself."

Accumulations in the corporations exempted have increased enormously since the Census of 1900. No recent statistics are available, but based upon that Census, it is conservatively estimated that the associations, societies and orders exempted under this Act will save not less than $3,000,000 a year by reason of such exemption.

The latest statistics of savings banks, covering the entire country, are those published in the Special Report from the Banks of the United

States to the National Monetary Commission and presented to the Senate by Mr. Aldrich December 21, 1909, Senate Document No. 225.

This shows, Table No. 3, that the total resources of 642 mutual savings banks at the close of business April 28, 1909, were $3,394,926,000.

The same Report shows, Table No. 4, that on the same date 1,061 stock savings banks held aggregate resources of $677,784,099.

Both of these classes of banks make profits for their members. Why should one be taxed and the other exempted?

Yet the yearly saving to mutual savings banks alone by this exemption amounts to $1,200,000, while the yearly tax imposed by the Act upon the mutual life corporations is largely in excess of such amount.

Why should they be singled out for this favor of the Government can only be answered by the suggestion that, great as is the aggregate bulk of their property, the individual interest of each member therein is comparatively small, making the number of members exceedingly large. Were such associations made subject to the tax the unpopularity of the tax and the Congress enacting the law would be so great as to call for adverse action thereon by the constituents mentioned in the McCulloch case cited above. At the same time this statement of the facts of the exemption demonstrates beyond cavil that the Act in question infringes in every line the rule of uniformity required by the Constitution.

2. Certainly no further proof can be needed to demonstrate that the corporation tax is not uniform. However, if it be urged that the word "uniform" does not mean "equal," we find in the primary conception of the word "tax" a requirement for equality. The powers of Congress are limited by the very nature of a free government, limitations respected indeed by all governments save ab-

solute tyrannies, and the right of taxation is subject to these limitations. These are discussed in Cooley on Constiutional Limitations, and his conclusions, found at pages 598, 607, and 615, are briefly:

1. A tax must not be a confiscation of property.

2. Taxes must be both equal and uniform. As all are protected, so all should bear the burden in proportion to the interests secured.

3. Whatever the basis, taxes must be uniform.

And again in the same author's work taxation page 54, it is stated that approximate equality inheres in the very nature of the power to tax, whether or not declared in the written constitution. To the same effect when a judge of the Supreme Court of Michigan he stated in an opinion, *People v. Salem*. 20 Mich., 452, at 473:

> "The tax must be laid according to some "rule of apportionment; not arbitrarily or "by caprice, but so that the burden may be "made to fall with something like impar- "tiality upon the persons or property upon "which it justly and equitably should rest "* * * Equality in the imposition of the bur- "den is of the very essence of the power it- "self, and though absolute equality and "absolute justice are never attainable, the "adoption of some rule tending to that end "is indispensable."

To the same effect is the decision in *Albany Bank v. Maher*, 9 Fed., 884.

Congress has no powers save those expressly granted, and its every enactment must be just and impartial.

Mugler v. Kansas, 123 U. S., 623, 661;

Coe v. Errol, 16 U. S., 517, 524, 529;
Soon Hing v. Chowley, 113 U. S., 703, 709.

It may be contended that the discrimination of the present tax is only proper classification, but it is respectfully submitted that the authorities do not bear out this contention, because the decisions permitting reasonable classification stop short of arbitrary and capricious discrimination.

Connolly v. U. S. P. Co., 184 U. S., 540, at 560, citing and quoting:

G. S. & S. F. Co. v. Ellis, 165 U. S., 150, 155-65;
Cotting v. K. C. S. Y. Co., 186 U. S., 79.

The line is well marked in

Amer. Su. R. Co. v. Louisiana, 178 U. S., 89,

where the Court said of a statute exempting sugar planters, refining their own sugar, from an excise tax:

> "The discrimination is obviously intend-
> "ed as an encouragement to agriculture,
> "and does not deny to *persons* and *corpora-*
> *"tions* engaged in a general refining busi-
> "ness the equal protection of the laws."

If the Act of 1909 is intended to encourage thrift why tax mutual life insurance companies?

Or if Congress desired to tax occupations, why exempt persons and firms?

For the right of classification, where it exists, may not be exercised in a spirit of prejudice or favoritism.

Cook v. Marshall Co., 196 U. S. 274.

And again:

> "The power of classification is conceded
> "but this will not uphold one that is purely
> "arbitrary. There must be some substan-

"tial foundation and basis therefor."

S. A. L. v. Seegers, 207 U. S., at 76.

And in this very connection it is important to note another discrimination against defendant and similar companies. The New York Life Insurance Company transacts business all over the civilized world, approximately one-fourth of its entire business being written outside of the United States, yet by the terms of the law it must pay a tax measured by the volume of its entire business, while foreign corporations, organized in other countries, are assessed for this tax upon the basis of the business done in the United States. This tax therefore is neither uniform nor equal in this particular.

No argument is needed to demonstrate that it is absolutely inequitable to levy upon a domestic corporation a heavier tax for business of the same character than upon a foreign corporation. Presumably defendant pays taxes in all foreign countries where it transacts business on the basis of the volume of such business, yet under the present law, it will be required to pay a tax here upon the business upon which it has already paid a tax abroad, while the foreign corporations in the United States are exempted from this double taxation.

It has been held repeatedly that a State cannot tax property or business permanently beyond its borders by reason of the due process clause in the Constitution.

L. Etc. Co. v. Kentucky, 188 U. S., 385, 398;
U. T. Co. v Same, 199 U S., 194, 209;
W. U. T. Co. v. Kansas, 216, 38;
Pullman Co. v. Same, 216 U. S., at 62.

And the same clause for the same reason renders invalid this attempt of Congress to tax the property

and business of the defendant located beyond the United States

3. The action of Congress then in taxing the defendant while exempting other corporations of the same class, doing the same business, finds no warrant in the Constitution and is in express defiance not only of the uniformity clause, but also of the provisions of the Fifth Amendment prescribing due process of law if private property be taken for public use. This Amendment, adopted in the fear that there might be abuse of the taxing power. (*McCulloch v. Maryland*, 4 Wheat., 433), provides that no person shall be deprived of property without due process of law.

In the *Sinking Fund Cases*, 99 U. S., 700, 718, this Court said: "The United States * * * equally "with the States, are prohibited from depriving "persons or corporations of property without due "process of law."

And in a recent case this Court held, *Traction Co., v. Mining Co.*, 196 U. S., 239, 251-2:

> "It is fundamental in American juris-"prudence that private property cannot be "taken by the Government, *National* or "State, except for purposes which are of a "public character, although such taking be "accompanied by compensation to the own-"er. That principle grows out of the essen-"tial nature of all free governments."

The reasoning upon which the rule so expressed finds its basis is strikingly illustrated by two cases decided in 1874, both of which have been frequently cited with approval and followed in this Court.

> Lowell v. Boston, 111 Mass. 454;
> Loan Ass'n v. Topeka, 20 Wall., 655.

In the former case it was said, page 461:

> "The principle of this distinction is fun-"damental. It underlies all government

"that is based upon reason, rather then up-
"on force. * * * This power, when exercised
"in one form, is taxation; in the other, is
"designated as the right of eminent domain.
"The two are diverse in respect of the occa-
"sion and mode of exercise, but identical in
"their source, to wit, the necessities of or-
"ganized society; and in the end by which
"alone the exercise of either can be justified,
"to wit, some public service or use."

In the latter case this Court, speaking by Mr. Justice Miller, said, page 663:

"The power to tax is, therefore, the
"strongest, the most pervading of all the
"powers of government, reaching directly
"or indirectly to all classes of the people.
"* * * This power can as readily be employ-
"ed against one class of individuals and in
"favor of another, so as to ruin the one class
"and give unlimited wealth and prosperity
"to the other, if there is no implied limita-
"tion of the uses for which the power may be
"exercised.

In *Hurtado v. Cal.*, 110 U. S., 516, at 535, the Court said:

"But it is not to be supposed that these
"legislative powers are absolute and des
"potic, and that the amendment prescribing
"due process of law is too vague and indef-
"inite to operate as a practical restraint
"It is not every act, legislative in form,
"that is law. Law is something more than
"mere will exerted as an act of power."

Therefore this Court has held again and again that process of law is only due when it operates on all alike, saying:

"Due process of law * * * is secured by

"laws operating on all alike, and not sub-
"jecting the individual to an arbitrary ex-
"ercise of the powers of government unre-
"strained by the established principles of
"private rights and distributive justice."

Leeper v. Texas, 139 U. S., 462, 468;
Giozza v. Tiernan, 149 U. S. 657, 662;
Caldwell v. Texas, 137 U. S., 692, 697;
Bank v. Okely, 4 Wheat., 235, 244.

Under these decisions it is apparent that an excise offends this provision of the Constitution when it taxes the defendant on one basis, foreign corporations doing the same business on an entirely different and more favorable basis, while it exempts entirely a large number of corporations doing exactly the same business, on the same lines, and governed by the same laws.

4. The corporations so exempted are clearly the object of undue favoritism. They are all private companies or associations in which the public as a whole has absolutely no concern. They are all composed of individuals united for a special business and they differ in no one particular from the defendant. They are all organized under State laws and derive no power, privilege or franchise from the Federal Government.

The constituents of the corporation, the citizens who compose it, are the real parties in interest, and on behalf of the citizens who compose the defendant it is respectfully urged that Congress has no right or power to discriminate between the defendant and the favored corporations so exempted. If classified it may be said that these are associations for the encouragement of thrift and providence. So is the defendant. Some of the exempted corporations have no stock. Neither has the defendant. If a company is to be favored because it is operated upon the mutual plan, why must the defendant pay a tax? Some of the corporations

so exempted have stock of various kinds, differing in no respect whatever from an ordinary banking institution making large profits and distributing the same to their shareholders. Upon what Constitutional theory in regard for due process of law are such corporations exempted and the defendant taxed, when the defendant has no stock and, in the proper sense of the word, never makes a penny of profit? Indeed, if the method of computation was the same for insurance companies as for banks and industrial companies, no insurance company would be required to pay the tax, because in every instance what the law in the case of the insurance company denominates "net income" is in reality only an over-payment upon the part of the policy holders, which is returned yearly to the policy holders, by the apportionment of surplus earnings, in cash or credit.

Accordingly, we repeat, why must the defendant pay this tax and the favored corporations escape? The only logical reply would seem to be that Congress by some inscrutable process of Constitutional interpretation has been led to bestow a preference on savings banks, building societies and fraternal orders over conservative insurance companies, no matter if the latter are mutual. The present tax is the first step and if it is sustained we may properly anticipate thatit will be followed by others ultimately looking to the extinguishment of corporations like defendant, and the increase and enlargement of building societies and fraternal orders with fanciful names. That the Constitution of the United States permits such a course of stupendous folly is incredible.

And in the *Pollock* case Mr. Justice Field said in discussing this limitation upon the taxing power:

> "This * * * forbids the imposition of "taxes which are unequal in their operation "upon similar kinds of property, and neces-

"sarily strikes down the gross and arbitrary "distinctions in the income law as passed by "Congress. The law, as we have seen, dis- "tinguishes in the taxation between corpor- "ations by exempting the property of some "of them from taxation and levying the tax "on the property of others when the corpor- "ations do not materially differ from one "another in the character of their business "or in the protection required by the gov- "ernment. Trifling differences in their "modes of business, but not in their results, "are made the ground and occasion of the "greatest possible differences in the amount "of taxes levied upon their income, showing "that the action of the legislative power "upon them has been arbitrary and capri- "cious and sometimes merely fanciful."

IV.

IF THIS IS A TAX ON THE RIGHT TO EXIST OF THE CORPORATION SUBJECTED THERETO, IT IS NOT AN EXCISE TAX WITHIN THE MEANING OF SECTION 8, ARTICLE I, OF THE CONSTITUTION AND IS THEREFORE VOID.

The right to exist,—or, as Mr. Justice Field put it, "The right given by the State to two or more persons of being a corporation, that is, *of doing business in a corporate capacity and not the privilege or franchise which when incorporated, the company may exercise,*" (Home Ins. Co. v. New York, 134 U. S., 599), is granted by the sovereign power of the State by which the corporation is created and rests in the individuals who at any given time constitute the corporation.

The right to be a corporation is the right granted to the persons constituting the same to exercise certain of the rights and powers of natural persons. By the power of the State the individuals who organize a corporation are endowed with the ability

to constitute an artificial person possessed of such powers of the natural person and of a prospective term of life as by the state prescribed.

The right of this artificial person to live and move and have a being is just as absolute and sacred under the power and protection of the State as is the right of the natural person so far as the lives of the two are in common. The States have never surrendered to the Nation in any degree whatever their own prerogatives of creating and protecting the right to live of private State corporations.

Mr. Justice Field further says (*supra*):

> "The granting of such right or privilege "rests entirely in the discretion of the State, "and, of course, when granted, may be ac- "companied with such conditions as its "legislature may judge most befitting to its "interests and policy. It may require, as a "condition of the grant of the franchise, "and also of its continued exercise, that the "corporation pay a specific sum to the State "each year or month, or a specific portion "of its gross receipts, or of the profits of its "business, or a sum to be ascertained in any "convenient mode which it may prescribe. "The validity of the tax can in no way be "dependent upon the mode which *the State* "may deem fit to adopt in fixing the amount "for any year, which it *will exact for the "franchise. No constitutional objection "lies in the way of a legislative body pre- "scribing any mode of measurement to de- "termine the amount it will charge for the "privilege it bestows.*"

Therefore Congress has no right under the Constitution to levy an excise tax upon this right of existence of a corporation.

At the time of the adoption of the Constitution

a franchise was defined as "a royal privilege, or a branch of the King's prerogative subsisting in the hands of a subject."

Cal. v. Pac. R. R. Co., 127 U. S, 1

This Court has defined a franchise as "special privilege conferred by the Govenment, which does not belong to the citizens generally by common right."

Augusta Bk. v. Earle, 13 Pet., 595.

In New York the definition has been stated as follows: "A franchise is a branch of the sovereign "power of the State subsisting in a person or a "corporation by a grant from the State."

R. H. R. R. Co. v. N. Y. R R Co, 44 Hun 206, at 212; affirmed and approved 110 N. Y., 228.

It is a franchise for a number of persons to be incorporated, and such franchise is distinguished from a franchise granted to a corporation after it is organized.

Memphis R. R. Co. v. Comm., 112 U. S. 619

This distinction has been many times recognized, instances being found in

Julian v. C. T. Co., 193 U. S., 106;
Vicksburg v. Water Co., 202 U S., at 464.

To tax a franchise of this character would be to impair one of the sovereign prerogatives of the individual State, and this Congress has no right to do, as the Court has frequently held.

Texas v. White, 7 Wall., 700;
Coll. v. Day, 11 Wall., 113, 127;
Pollock v. Trust Co., 157 U. S., 584;
So. Car. v. U. S., 199 U. S., 453.

In a case involving a somewhat similar question

the Court said, *West River Bridge Co. v. Dix*, 6 How., 507, 548, that a contract of incorporation "*may be taxed by the government under which it* "*is held*. though not by other governments so as to "impair or obstruct it."

This conclusion necessarily follows from the principle that the two governments, State and Federal, exist side by side and neither can interfere with the other.

> McCulloch v. Md., 4 Wheat., 316;
> California v. Pac. Ry. Co., 127 U. S., 1.

The point was discussed in *Ambrosini v. U. S.*, 187 U. S., 1, holding the Federal war revenue stamp tax inapplicable to bonds required from liquor shops in Illinois. The Court said, page 8:

> "The question is whether the bonds were "taken in the exercise of a function strictly "belonging to the State and city in their or- "dinary governmental capacity and we are "of the opinion that they were, and that "they were exempted as no more taxable "than licenses."

Examining all the decisions cited we find the key-note to be this: *Where a right granted by a State is in derogation of its sovereignty Congress has the power to tax; where a right granted by a State is in exercise of its sovereignty Congress has no power to tax.* This contrast is clearly established by the *Ambrosini* and *Knowlton v Moore* cases. In the former the right discussed was in exercise of sovereignty and not taxable; in the latter the right discussed was in derogation of sovereignty and taxable. The Court held that State appointed liquor dealers must pay the regular excise tax on that occupation, because if the State chose to engage in such business it must do so upon the same terms as any other person, and that to do business was not a function of sovereignty.

The South Carolina case takes one step further, and examines the attributes of sovereignty in the light of the understanding of the framers of the Constitution. That light when brought to bear upon the present issue makes clear that corporate franchises are granted in the exercise of sovereignty inasmuch as at the time the Constitution was adopted almost every corporate franchise was bestowed by a Special Act of the State, and the power to create corporations was esteemed one of the chief privileges of the Legislature and to be most jealously guarded on that account.

Therefore it is confidently urged that the present tax cannot be maintained as an excise upon the franchise of existence, and this conclusion is borne out by the phraseology of the Act itself, which purports to levy the tax "with respect to the carrying on or doing business by" the corporation assessed.

To properly construe this wording requires an examination of the definition of the word "excise," a point also before the Court in the *Spreckels* case where the Government contended with regard to the law then under discussion (192 U. S., 405): "That the tax is distinctly *an excise and indirect*, "and, so considered, it is uniform; that it cannot "be viewed as direct under the decisions of this "Court or under any authorities, judicial or econ-"omic, (a) because it does not fall upon persons "or property or incomes, except in the most re-"mote and indirect sense; (b) because it falls upon "a calling or occupation or the gains therefrom; "(c) because it really operates upon the *operation* "of an industry, the *exercise* of a right, the *use* of "property, upon the business energies or activities; "(d) *because the incidence of the tax can be, and "is, shifted and passed on, and, while immediately "paid by the refiner, is ultimately paid by the con-"sumer.*"

The Government here relied on that meaning of the word "excise," which was most assuredly in

the minds of the framers of the Constitution, who considered such an impost *a duty upon use, upon consumption, a tax which, by non-user or refraining from consumption, the individual subject of the taxing power may avoid.*

That being the proper idea of an excise can a corporation upon which the present tax is levied pass the tax on to the consumer?

Manifestly such a result is impossible. The corporation, so taxed, must submit to and pay the tax itself. It is not, it cannot be a tax upon consumption, a tax on use; it is, and can be nothing more nor less than a tax upon the corporation itself, a direct tax upon the corporate entity, a poll tax, in other words.

Can it ever be urged, even by the wildest flight of imagination, that such a tax was within the contemplation of the men who drafted the Constitution or the States which ratified its adoption?

Did the States, when they surrendered to the Federal Government the right to levy duties upon imports and excises upon trades or callings—taxes in other words upon use and consumption,—did they ever dream that this clause of their grant would some day be involved to tax the existence of their citizens?

The old definition carries with it the suggestion of the greatest danger which exists in this law, the most potent argument against its validity.

An excise tax has always been a tax which could be avoided by non-user. This excise tax, if it shall be sustained, can be avoided in but one way, *not by non-user but by non-existence.*

The corporation cannot cease to use, it can only cease to exist.

The corporations are the creatures of the several States, to them they owe the very right to their existence, the right to be, and it has been held in a long line of decisions:

See Plummer v. Coler, 173 U. S.

The State—the sovereignty which bestows such right of existence—can alter, can prescribe the terms of the continued existence of its created subjects, can if it so wills, destroy such existence. (Plumner v. Coler, 178 U. S., at page 128, quoting the above opinion of Mr. Justice Field).

Is it conceivable that the sovereign States have granted to the United States the power to destroy the corporations, which the States in the exercise of their independent soverignty have created and fostered, and from which they do derive large incomes?

Let us turn for a moment from the question of principle involved to the practical results. Already we find urged upon the Congress, the passage of a law for Federal incorporation. The desirability of such a law for certain corporations engaged in interstate commerce is not at issue.

But the possibilities resulting from its passage are as clear as the fate of state banknote circulation when the Federal Government determined upon the advisability of its elimination. *There*, in that instance, it was held that the States had expressly granted the right, but here in the absence of any scuh express grant by the States, *can it be held that under the grant of power to levy excises, they surrendered to the Federal Government the power to destroy the existence which they themselves have created, in the exercise of their preogatives as sovereign States.*

In the State of New York, as shown by a message of Gov. Hughes, the collection of the corporation franchise tax was over $9,000,000, nearly one-third of the entire amount collected by the State.

Whatever powers, express or implied, are granted in the Constitution to Congress to create corporations, it is respectfully submitted, that no further power remains to drive out of use by an excise on the right to exist any one of the lawful means and instrumentalities of the States.

The determination of the issue raised by the question whether the present tax is an excise on the right to exist of private State corporation is far reaching and momentous in consequence. On this decision depends, in a most important degree, the separate and independent condition of the States, as established by the Constitution, and the existence of which this Court has held to be "so indispensable that without them, the general "government itself would disappear from the fam-"ily of nations."

Collector v. Day, 11 Wall., 113.

V.

THE PENALTIES PRESCRIBED BY THE ACT ARE UNCONSTITUTIONAL.

In the attempt to carry this unconstitutional tax into effect Congress has adopted an unconstitutional method. The administrative feature of the Act requires all corporations thereby taxed to produce and disclose their private books and papers at the request of the Federal authorities, with the view of subjecting them to the penalty imposed by the Act. That this provision offends the provisions of Articles IV and V of the Amendments to the Constitution is apparent on its face.

Boyd v. U. S., 116 U. S., 627, passim.

A similar provision of the tax law heretofore discussed by this Court on other features in *People v. Reardon*, 204 U. S., 152, has recently been held by the New York Court of Appeals to be unconstitutional for this very reason, and the Court said (*People v. Reardon*, 197 N. Y., 236-244):

> "This kind of an inquisition and the at-"tempt to secure from an individual evi-"dence which may be used to convict him "of a crime or to forfeit his property comes

"well within the principles which have been "applied to the interpretation of the Con- "stiution."

See also:

Robson v. Doyle, 191 Ill., 566;
Emery's Case, 107 Mass., 172;
Counselman v. Hitchcock, 142 U. S., 562,
People v. Forbes, 143 N. Y., 219;
People v. O'Brien, 176 N. Y., 253.

Summary.

The argument that the law is unconstitutional may be summarized as follows:—

1. The tax imposed is an income tax pure and simple, for, although the name is changed, the Court will regard the substance rather than the name. The tax is therefore invalid under the decisions of this Court in the Pollock case.

2. Considered as an excise the tax is not uniform. It does not apply to all of a class alike, neither is it imposed on all of a class throughout the United States, differing in its application in New York and Massachusetts, as has been shown. It is therefore invalid.

3. The tax is not equal on all members of the classes it seeks to reach, exempting without basis some and taxing others. It is therefore invalid.

Loan Ass'n v. Topeka, 20 Wall., 655.

4. In the same way the tax offends the due process clause of the Constitution. It in effect assesses certain corporations for the benefit of others which are exempted. It is therefore invalid.

Traction Co. v. Mining Co., 196 U. S., 239, at 251.

5. The effect of the tax under the provisions of

the present law is to create favored classes, contrary to the provisions of the Constitution.

Loan Co. v. Topeka;
Leeper v. Texas.

6. The present tax cannot stand as an excise on the privilege to exist, for that right comes from the State and is not taxable by the Federal Government.

Ambrosini v. U. S., 187 U. S., 181.

7. The administrative features of the Act are invalid because they offend the provisions of Articles IV and V of the Amendments to the Constitution.

Respectfully submitted,

CHAS. HOWARD WILLIAMS,
Of Counsel for Appellants.

Office Supreme Court U. S.
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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 456.

WILLIAM F. FLUHRER, et al.,

Appellants,

vs.

NEW YORK LIFE INSURANCE COMPANY.

BRIEF OF APPELLANTS.

HOWARD H. WILLIAMS,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 456.

WILLIAM F. FLUHRER, and others,
Complainants-Appellants,

against

NEW YORK LIFE INSURANCE COMPANY,
Defendant-Appellee.

BRIEF FOR APPELLANTS.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

This case comes before the Court upon an appeal taken from the decree of the United States Circuit Court for the Southern District of New York sustaining a demurrer to the bill, filed by the complainants who hold policies issued by the defendant, on behalf of themselves and all other

policy holders similarly situated, for the purpose of restraining the defendant from making a return of its income and paying a tax thereon pursuant to the provisions of Section 38 of the Act of August 5, 1909, which Section is known as the "Corporation Tax Law."

The bill sets forth certain facts, as follows:

The defendant is a corporation without any capital stock, organized under a Special Act of the Legislature of the State of New York in 1841, and is vested with certain corporate powers as a mutual life insurance company, operating solely under the supervision and control prescribed by the Insurance Law of said State.

All of defendant's assets and all its income are acquired, invested, reserved and held for the sole benefit and protection of the holders of policy and annuity contracts issued by it, and such assets and income are paid and distributed to its policy holders as in such Insurance Law prescribed. Defendant has outstanding approximately 981,590 policies, of an approximate face value of $2,002,809,227, and this suit is for an object common to them all. At the close of business on December 31, 1909, the assets of the defendant exceeded the sum of $599,000,000. Among such assets were included bonds of the United States Government, various States, and Municipalities of the aggregate market value of $77,015,254, of which United States Government bonds are of the value of $1,150,000, bonds of the State of Massachusetts $4,200,000, and bonds of the City of New York $7,000,000. All of the bonds so held were issued pursuant to lawful provisions exempting them from taxation for all purposes.

Furthermore, defendant owned at that date various parcels of real estate of the aggregate value of $11,718,000, from which it received an annual income in excess of $526,000 over and above all taxes, repairs and expenses of maintenance. Of this real estate various parcels having an aggregate value of over $2,400,000 are located in foreign countries, namely, France, Prussia, Austria, Holland and Servia. Defendant is engaged in the business of writing insurance all over the civilized world and approximately one-quarter of its business is derived from foreign countries in no way under the jurisdiction of the United States.

Under the law of New York, there is no distinction in substance between the methods of holding and preserving the assets of the defendant for the benefit of its policy holders and the methods employed by saving banks and benefit associations, in holding their assets for depositors and members respectively, in that all assets are held by such institutions for the sole benefit of the policy holders, depositors and members, and the corporations themselves make no profits from the ownership of such assets, by reason of the law which prescribes that all surplus earnings must be apportioned yearly for the benefit of the policy holders, depositors and members and are the property of the same when so apportioned.

Many domestic and foreign corporations do business in the United States on lines similar to those pursued by the defendant, the amount of the business varying in each case, so that the exemption provided in the Statute above mentioned forms a widely different proportion to the net income of such corporations.

Defendant purposes to make and file with the Collector of Internal Revenue in the City of New York a return in the form prescribed by the Commissioner of Internal Revenue in compliance with the requirements of the said Act, and defendant intends to include in the income upon which such computation is made the income derived from said bonds of the United States, the State of Massachusetts and the City of New York, and defendant claims that by virtue of the alleged authority and requirements of such Act it is required to pay, and it intends to pay, to said Collector on or before June 30, 1910, a tax of One Per Cent. (1%) on its net income for the year 1909, computed as aforesaid.

The net income of defendant for the year 1909 is in excess of $10,000,000, computing the same as in such Act prescribed.

The bill then charges that the provisions of said Act for a corporation tax are unconstitutional, null and void, in that the said tax is a direct tax in respect of the real estate held and owned by defendant in its own right, which tax is not in and by said Act apportioned among the several States, as required by Section 2 of Article I, of the Constitution; and also that if the tax is not held to be a direct tax its provisions are nevertheless unconstitutional, because they are not uniform throughout the United States as required by Section 8 of Article I of the Constitution.

The bill charges further that the tax is not uniform as to property, class, or subject because the net income above actual operating and business expenses of many labor, agricultural and horticultural organizations, fraternal, beneficiary societies, orders and associations, and domestic

building and loan associations, amounts to more than $5,000 per annum, and said Act creates an artificial distinction between such corporations and the defendant, and that said Tax is imposed upon defendant and other mutual insurance companies but is not imposed upon the other corporations so named, nor upon mutual savings banks, although in Massachusetts by a Statute enacted in the year 1907 mutual savings banks are authorized to issue life insurance policies upon terms and under conditions substantially similar to those controlling the business of the defendant by the law of New York.

The complainants further charge the tax to be unconstitutional because it is imposed upon a small minority of the corporations of the United States, namely those which have profits in excess of $5,000 per annum, and that the remaining corporations comprising the great majority of those in the United States are exempted from payment of the tax, although they hold in the aggregate the greater part of all corporate property.

Again, it is claimed that the provisions of the corporation tax are unconstitutional, because the tax is imposed upon income not taxable under the Constitution of the United States, being derived from bonds of the United States, of the several States, Counties and Municipalities thereof.

Again it is claimed that the tax is unconstitutional, because all the corporations thereby taxed may, under and by virtue of its provisions, be deprived of their property without due process of law, in violation of Article V of the Amendments of the Constitution.

The complainants then allege the tax is also unconstitutional because all corporations thereby

taxed may be compelled to produce and disclose their private books and papers in order to make them liable for the penalty or forfeit their property, in violation of Articles IV and V of the Amendments to the Constitution.

Finally, it is stated that the suit is not collusive; that if the defendant pay such tax it will diminish its assets, decrease the amounts which the policy holders are entitled to receive and lessen the value of all such policies; with the result that such tax is a direct tax upon the policy holders.

The bill concludes with the statement that this is a suit of a civil nature in equity, and that the matter in dispute exceeds, exclusive of interest and costs, the sum of $5,000, and that it arises under the Constitution and Internal Revenue Laws of the United States, and complainants pray that it may be adjudged and decreed that the provisions of Section 38 of the Act are unconstitutional, and that the defendant be restrained from voluntarily complying with the provisions thereof.

The defendant demurred on the ground of want equity and the bill was dismissed with costs, whereupon the record recited that the constitutionality of a law of the United States was drawn in question and an appeal was allowed directly to this Court.

Assignment of Errors.

Complainants assign as error that the Court erred in not holding the Act mentioned unconstitutional in that it violates Section 2 and 8 of Article I of the Constitution, and Articles IV and V of the Amendments thereof.

I.

The tax imposed by the Act of 1909 considered as an income tax is void.

1. The law of 1909 differs from the law of 1894 only as follows:

(a) By exempting all individuals.

(b) By imposing a tax on domestic mutual insurance corporations and upon the business in the United States of like foreign corporations.

(c) By including the income derived from government bonds, otherwise exempt.

(d) By increasing the amount of net income exempted from $4,000 to $5,000.

(e) By reducing the rate of tax from 2% to 1%.

2. The tax of 1909, as was the tax of 1894, is an attempt to levy a tax upon income derived from real estate and personal property, including State and Municipal bonds otherwise exempt, and is imposed without apportionment.

It is respectfully submitted that what this Court held in the Pollock case to be invalid under the Act of 1894, applies to that which is identical in principle under the Act of 1909, and the invalidity thereof is thereby established.

It is an established rule of constitutional construction that "the *judiciary will not regard mere "forms, but will look through the forms to the sub-"stance of things.*" Such is the language of Mr. Justice Harlan in the recent decision of Western Union Tel. Co. vs. Kansas, 216 U. S., 1, at page 27.

Citing

Henderson vs. Kansas, 92 U. S., 259, 268.
Mugler vs. Kansas, 123 U. S., 623, 661.
Lyng vs. Michigan, 135 U. S., 161, 166.
Robbins vs. Shelby Tax Dist., 120 U. S., 489, 497.
Minnesota vs. Barber, 136 U. S., 313, 319, 326.

To exactly the same effect is the statement of Mr. Justice Moody in Home Savings Bank vs. Des Moines, 205 U. S., where, at page 510, he says: "*But the true interpretation of the law cannot "rest upon a single phrase* in it. *All its parts "must be considered* in the manner pursued by this "Court in New Orleans vs. Houston, 119 U. S., 265, 278, and Home Ins. Co. vs. New York, 134 U. S., 594, *with a view of determining the end accomplished* by the taxation, *and its actual and substantial purpose and effect.*"

Under this principle therefore it is clear that the phraseology of the law "*a special excise tax with "respect to the carrying on or doing business,*" etc., will not avail if the actual end and effect of the law is the taxation of corporate income in violation of constitutional limitation.

It is appropriate to cite here the *Bank Tax Case,* 2 Wall, 200, holding that a State might not tax indirectly, in the "*measured by*" *method,* what it could not tax directly.

So in *Home Bank* vs. *Des Moines,* 205 U. S., 515, the Court in reaffirming the doctrine of Federal immunity from State taxation, declined to find a distinction between a tax on Federal securities and the capital invested in such securities.

Citing Bank Tax Cases and

Weston vs. Charleston.
O. N. Bk. vs. Owensboro, 173 U. S., 664.

If a tax on gross receipts, *not even disguised as an occupation tax,* is not helped out by its being *measured* by or *equal* to a definite percentage, the same rule would seem to govern a tax with such a disguise. For the disguise is but a thin and transparent device disclosing the old, unlawful unapportioned income tax. And there is not even a "slight concealment."

Home Bk. vs. Des Moines, 205 U. S., 515.

If the Government needs an income tax why not have one in the constitutional way? Because it would be unpopular is the only adequate answer.

It seems to need no further argument that the present corporation tax is a direct tax upon the real personal property held by the defendant for its policy holders, and also upon the Government, State and Municipal bonds owned by it. The tax is therefore invalid, not being apportioned according to population.

The "actual effect" is clearly manifested in the case of the present defendant. Its net income from investments is approximately $26,000,000 of which $526,000 is from real estate, about $3,000,000 from Government, State and Municipal bonds.

This case therefore falls directly under the authority of *Income Tax Cases*, 157 U. S., 429; 158 U. S., 601.

It is an attempt

1. To tax the income of State and Municipal securities.

2. Under the phraseology of an excise tax, to levy in purpose and effect, a direct tax, without apportionment, upon the rentals of real estate and the income derived by the defendant corporation generally from its investments in personal property.

Neither of which acts is within the power of Congress and the law is therefore unconstitutional and void.

Inasmuch as, by an order of the Court, this appeal is to be argued with a number of other cases involving the validity of the Act of 1909, no further citation of authorities will be made under this Point and the continuation of this brief will be directed to the application of the Act to the special facts shown in the bill.

II.

The tax imposed upon defendant, as by the Act of 1909 required, is a direct tax, and therefore void.

The defendant is a corporation created by the State of New York, without capital stock or shares, and exercises its corporate powers as a strictly mutual life insurance company, as in the Insurance Law of such State prescribed. In addition to the payment of its policies as they mature, defendant is bound to apportion yearly to its policy holders any surplus earned in excess of specific amounts lawfully reserved. No gains or profits can be derived by defendant from such exercise of its powers.

The statutory conditions upon which the powers of defendant are exercised are set forth in Chapter 28 of the Consolidated Laws of the State of New York, therein designated the Insurance Law, an extract from which is as follows:

> "Section 83. Upon the thirty-first day of "December of each year, or as soon there- "after as may be practicable, every such cor- "poration shall well and truly ascertain the "surplus earned by such corporation during "said year. After setting aside from such sur- "plus such sums as may be required for the "payment of authorized dividends upon the "capital stock, if any, and such sums as may "properly be held for account of existing defer- "red dividend policies and for a contingency "reserve not in excess of the amount prescrib- "ed in this article, *every such corporation shall "apportion the remaining surplus equitably "to all other policies entitled to share therein.* "Except in the case of a term or an industrial "policy *the share of surplus so apportioned* in "the case of a policy issued on or after the "first day of January, nineteen hundred and "seven, *shall, at the option of the owner of "the policy, be payable in cash, or shall be "applicable to the payment of any premium "or premiums upon said policy or to the "purchase of a paid-up addition thereto or "shall be permitted to accumulate to the "credit of the policy at such rate of interest "as shall be allowed by the company, and "with such interest shall be payable upon "the maturity of the policy or shall be with- "drawable in cash by the owner of the policy*

"*on any anniversary of the date of issue* "*thereof.* Such corporation may require "the owner of the policy to elect the manner "in which said dividends shall be applied as "above provided by mailing a written notice "of the amount of said dividends and the "options available as aforesaid in a sealed "envelope in the manner required by the "provisions of this chapter for notices of "premium payments, and in case the owner "shall fail to notify the company in writing "of his election within three months after "the date of mailing of said notice, the "surplus shall be applied by the company "to the purchase of a paid-up addition to the "sum insured."

Corporations of this character were expressly exempted from income tax by the Act of 1894. The present Act, however, purports to tax mutual insurance companies, although still exempting from its provisions mutual savings banks, fraternal orders and benefit associations. This is a marked departure from the policy of earlier Acts to which Congress was doubtless led by the fact that the net earnings of mutual insurance companies are estimated to be not less than $100,000,000 a year. There is, however, a sharp distinction between such corporations and business corporations organized for gain, and the effect of this distinction must be noted. In one case all corporate property is held by the corporation for its own account, and its shareholders—although the ultimate beneficiaries —have no direct interest therein; while in a mutual life insurance company the legal relation of the policy holders to the corporation is quite dif-

ferent. It is well understood, and is the feature of mutual life insurance which gives to it great stability, that policy holders pay premiums in excess of the actual cost of their insurance and it is the surplus arising each year over actual cost and reserves which must be returned to the policy holders by the statutory apportionment.

It follows, then, from the application of such Insurance Law to the tranactions of defendant that it is an instrumentality used by its policy holders for the sole purpose of combining and employing their savings for the mutual protection of themselves and their dependents at the lowest possible cost and with the largest possible returns of yearly surplus, having dye regard to safety, and without profit to the corporation or to the policy holders.

Such being the status of defendant it is respectfully submitted that the tax imposed upon it by the Act of 1909 is a tax measured by a surplus fixed and set apart by the law of New York for payment to the policy holders of defendant, and is therefore a direct tax upon property held by defendant for such payment. Under the *Pollock* case it is also a direct tax upon so much of such surplus as is derived from the income of real estate and the income of personal property, including Government, State and Municipal bonds, otherwise exempt.

Pollock vs. *Farmers' Loan & Trust Co.*,
157 U. S., 429; 158 U. S., 601.

III.

As an Excise on business or occupation the tax imposed on defendant by the Act of 1909 is void, for reasons as follows:

1. It is not uniform.

2. It is not equal upon the classes assessed.

3. It takes property without due process of law.

4. It creates a favored class.

1. *The tax is not uniform.*

It is unquestionably within the power of Congress to levy an excise under Sec. 8 of Article I, upon the business of life insurance in which this defendant is engaged.

And such a law might well include an almost limitless variety of occupations or businesses. Any and all such excises must, however, comply with two fundamental principles.

(a) They must be uniform throughout the United States.

(b) They must contain that element of equality or uniformity which is at the base of all taxation, of bearing with equal weight upon all persons of equal resources engaged in the same line of business.

Any other course means that Congress can drive whomsoever it sees fit out of any line of activity taxable under Section 8.

And the definition and meaning of the word "excise" as it was used at the time of the adoption of the Constitution would thereby be destroyed; for all are agreed that such a tax was considered a tax on consumption, one which could be shifted from the original manufacturer to the purchaser. Very obviously, if Congress has the constitutional power to tax industries when carried on by corporations —at the same time exempting all individuals and firms, as here—the corporations cannot shift the burden for those exempted from the tax can undersell. If Congress has the power to tax at all, in this manner it can tax at such rate as it sees fit until any or all corporations in any given line of industry are driven out of existence.

As Judge Cooley said in his work on Constitutional Limitations—page 695:

> "Everything that may be done under the "name of taxation is not necessarily a tax; "and it may happen that an oppressive bur- "den imposed by the government, when it "comes to be carefully scrutinized, will "prove, instead of a tax, to be an unlawful "confiscation of property, unwarranted by "any principle of constitutional govern- "ment."

It is clearly established that if Congress wishes to impose an excise on sugar refining or distilling, or life insurance, it must impose such tax, without discrimination, upon all those, whether persons, firms or corporations, who in like manner and under similar conditions engage in the particular line of business made subject to the tax.

And for the same reasons, it cannot impose an excise upon the business or occupation of all cor-

porations engaged in a certain line of business, or as in this law in all lines of business, and exempt all persons, firms or mutual associations engaged, with similar capital in like lines of business.

Such excise is not taxation but confiscation and is not within the constitutional powers of Congress.

In *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, this fundamental principle was recognized by all the distinguished counsel. The Attorney-General and his assistant saw fit to use illustrations most pertinent to the present issues.

Mr. Whitney, at page 474, says "there is, however, a certain degree of uniformity involved in the very word 'tax,' a uniformity requirement involved in the definition of that word and guaranteed by the Fifth Amendment to the Constitution." * * * *"A special tax cannot be laid upon A, simply because he is A and not B.* Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken."

And the Attorney-General, at page 507, reinforces this point by the assertion that "A law, for instance, providing for a tax to be paid by the light complexioned members of the community and exempting the dark, *would be unhesitatingly pronounced void as being not a use but an abuse of the taxing power.*"

Manifestly it was the intention of Congress in enacting the present law to avoid the Income Tax decision under the Act of 1894 by denominating the present tax an "excise" for which purpose it undoubtedly relied upon the case of *Spreckles S. R. Co., vs. McClain*, 192 U. S., 397. But that case is wholly insufficient to sustain the present law.

In that case the Court evidently considered an excise tax to be a tax upon the business or occupation of the corporation assessed, and the law was valid only to the extent that the corporation so assessed was engaged in that business. The Act of 1898 applied to "every person, firm, corporation or company carrying on" the business mentioned. As an excise tax it therefore complied with the requirements of the Constitution that it should be uniform throughout the United States.

The present tax is limited to corporations and is therefore wholly wanting in the essential feature of uniformity.

It is imposed by the terms of the Act on every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company engaged in business in the United States.

> "Provided, however that nothing in this "section contained shall apply to labor, agri- "cultural or horticultural organizations, or "fraternal beneficiary societies, orders, or as- "sociations operating under lodge system, and "providing for the payment of life, sick, acci- "dent, and other benefits to the members of "such societies, orders or associations, and de- "pendents of such members, nor to domestic "building and loan associations, organized and "operated exclusively for the mutual benefit of "their members, nor to any corporation or as- "sociation organized and operated exclusively "for religious, charitable or educational pur- "poses, no part of the net income of which in- "sures to the benefit of any private stockholder "or individual."

That the tax so levied is not a uniform excise duty, would seem perfectly apparent from the phraseology of the Act itself.

It must be conceded at the outset that the tax is not an excise upon any specific occupation or profession for none is specified, and if the tax were imposed upon certain trades or occupations, to be uniform it must be levied upon persons and firms as well as upon corporations and companies.

In *Knowlton* vs. *Moore*, 178 U. S., 41, it is held that the word "uniform" must be interpreted in the geographical sense. But the act of 1909 does not even comply with the requirements of uniformity as so defined.

The Statute arbitrarily exempts fraternal orders, benefit associations, building societies, and mutual savings banks—the last named because they are not included within the definition of corporations upon which the tax is imposed.

Thus the tax is not uniform in even a single State where these various organizations transact business. Further, the tax is not uniform throughout the United States because, as the bill shows, in the State of Massachusettes mutual savings banks are authorized to write life insurance policies by Chapter 561 of the Acts of 1907. This life insurance department in savings banks is, by the provisions of such law, conducted under conditions almost identical with those governing the business of this defendant as stated above. The particular Sections of the Act establishing this fact are as follows:

Massachusetts Acts of 1907, Chapter 561, entitled "An Act to Permit Savings Banks to Estab-"lish Life Insurance Departments.

"Sec. 2. Any savings bank may, upon com-
"plying with the provisions hereinafter set
"forth, establish an insurance department."

After providing for guaranty, reserve, and special emergency funds the Act reads:

"Sec. 21 * * * The balance of the net
"profits shall be distributed equitably annually
"among the holders of its policies and an-
"nuity contracts; such distribution to be made
"in the discretion of the trustees either
"in cash or by addition to the amounts pay-
"able under the policies or annuity contracts."

This affords a striking example of the non-uniformity of this Act throughout the United States due to this provision of Massachsetts law. It is a violation of the rules of uniformity and absolutely inequitable to tax this defendant in the State of New York and exempt corporations doing precisely the same business, on the very same conditions, in the adjoining State of Massachusetts.

In the same way building and loan associations, and fraternal beneficiary societies are all operated for the benefit of their members, as is the defendant here. It is common knowledge that fraternal societies have been obliged to abandon the old assessment plan upon which they were originally organized, and now accumulate a reserve for the payment of benefits exactly as the defendant company accumulates a reserve for the payment of death losses.

Such associations when organized in New York conduct their business under the Insurance Law.

Alden vs. K. of M., 178 N. Y., 535, 539-40.
Peo. vs. K. of St. J., 198 N. Y., 15.

The condition described is, however, not peculiar to New York societies, for in a very recent work on the subject, Bacon on Benefit Societies, 3rd Ed., §52, it is stated:

> "It follows from the foregoing adjudica-
> "tions that all benefit societies, whether cor-
> "porations or mere voluntary associations, are
> "strictly speaking, insurance organizations
> "whenever, in consideration of periodical con-
> "tributions, they engage to pay a member, or
> "his designated beneficiary, a benefit upon the
> "happening of a specified contingency."

Citing:

> Com. vs. Wetherbee, 105 Mass., 149;
> Franklin Ass'n vs. Com., 10 Pa. St., 357;
> Golden Rule vs. Swigert, 118 Ill., 492;
> End. Ass'n vs. State, 35 Kan., 253;
> Rockold vs. Society, 129 Ill., 440.

The subject of uniformity as affecting attempted exemptions of the character above described is most fully discussed in the opinion of Mr. Justice Field in the *Pollock* case at page 593, where it is explained that equality is an essential element of the uniformity required so far as the same is practicable, citing *U. S.* vs. *Singer*, 15 Wall. 111, 121, where it is held that the excise tax upon distillers was valid because uniform in its operation. "That "is, it is assessed equally upon all manufacturers "of spirits wherever they are. The law does not es- "tablish one rule for one distiller and a different "rule for another, but the same rule for all alike."

To the same effect were the *Head Money* cases, 112 U S., 580, 594, decided at circuit, 18 Fed.,

135, 139. A quotation is also made from the well-known lectures of Mr. Justice Miller on the Constitution (New York, 1891), where it is said, page 214: "*Different articles may be taxed at differ-*"*ent amounts provided the rate is uniform on the* "*same class everywhere, with all people, at all* "*times.*"

Applying these fundamental principles to the Act of 1909 it is plain that it does not meet these requirements. It does not extend to all corporations throughout the United States of the same class. A corporation writing life insurance in New York on certain conditions is assessed; a corporation writing life insurance in Massachusetts on conditions almost identical is exempted. Again, a corporation writing life insurance in New York is assessed if organized in a certain way and called a company, but a corporation writing life insurance in the same State, organized in a slightly different way but under the same general law and called the "Supreme Tent of the Knights of the Maccabees of the World" is exempted.

While not practicable in the case of the present defendant on account of its enormous interests extending all over the world, it would be possible with a smaller and more recently organized company, of exactly the same character, to defeat the tax entirely by dissolving itself as an insurance company and re-incorporating, with the same members, the same assets, the same liabilities, under some fanciful title as a benefit association.

Again, it is manifest that the requirement of equality is not satisfied by the provisions of the present law. Could there be any doubt on the subject that excise taxes of this character shall be in all respects uniform and impartial, that doubt, as

Mr. Justice Field stated, 157 U. S., 595, should be resolved in the interest of justice in favor of the taxpayer. It is respectfully submitted that the conclusions of the learned Justice apply with full force to the present law. Exemptions create inequalities; those not exempted bear an additional burden; a law containing arbitrary and capricious exemption is not uniform. Under the Constitution Congress has no power, at the expense of others owning property identical in character, to sustain private corporations such as building and loan associations, savings banks, and benefit societies, which advance no purpose or public interest and exist solely for the benefit of their own members. It has long been held that private enterprises cannot be aided under the pretence that it is legislative discretion to exempt them.

Loan Ass'n vs. Topeka, 20 Wall., 655;
Barbour vs. Louisville Bd. of Trade, 82 Ky., 645, 654-5;
Parkersburg vs. Brown, 106 U. S., 487.

Cooley on Taxation, page 215, observes:

> "It is difficult to conceive of a justifiable "exemption law which should select single in- "dividuals or corporations. or single articles "of property, and, taking them out of the class "to which they belong, make them the subject "of capricious legislative favor. Such favor- "itism could make no pretence to equality; it "would lack the semblance of legitimate tax "legislation."

None of the corporations exempted in the present Act can claim to be of a public or benevolent nature; under the law they differ in no essential

characteristic in their business from the corporations that are not exempted, while in fact, as the records of every court demonstrate, many building and loan associations and benefit orders find their reason for existence rather in the compensation to be paid to their officers than in the benefits to be paid to their members.

The discriminations of the law make for class legislation, yet it is the discrimination which makes this legislation possible. In one of the early cases this Court said, McCulloch vs. Maryland, 4 Wheat., 316, 435: "When they (the Congress) tax "chartered institutions of the States, they tax their "constituents; these taxes must be uniform."

Mr. Justice Field says, page 596: "Under * * * "constitutional legislation every citizen should "contribute his proportion, however small the sum, "* * * and it is no kindness to urge any * * * "to escape from their obligation. If he contributes "the smallest mite * * * he will have a greater "regard for the Government and more self-respect "for himself."

Accumulations in the corporations exempted have increased enormously since the Census of 1900. No recent statistics are available, but based upon that Census, it is conservatively estimated that the associations, societies and orders exempted under this Act will save not less than $3,000,000 a year by reason of such exemption.

The latest statistics of savings banks, covering the entire country, are those published in the Special Report from the Banks of the United States to the National Monetary Commission and presented to the Senate by Mr. Aldrich December 21, 1909, Senate Document No. 225.

This shows, Table No. 3, that the total resources of 642 mutual savings banks at the close of business April 28, 1909, were $3,394,926,000.

The same Report shows, Table No. 4, that on the same date 1,061 stock savings banks held aggregate resources of $677,784,099.

Both of these classes of banks make profits for their members. Why should one be taxed and the other exempted?

Yet the yearly saving to mutual savings banks alone by this exemption amounts to $1,200,000, while the yearly tax imposed by the Act upon the mutual life corporations is largely in excess of such amount.

Why should they be singled out for this favor of the Government can only be answered by the suggestion that, great as is the aggregate bulk of their property the individual interest of each member therein is comparatively small, making the number of members exceedingly large. Were such associations made subject to the tax the unpopularity of the tax and the Congress enacting the law would be so great as to call for the adverse action thereon by the constituents mentioned in the McCulloch case cited above. At the same time this statement of the facts of the exemption demonstrates beyond cavil that the Act in question infringes in every line the rule of uniformity required by the Constitution.

2. *The tax is unequal.*

Certainly no further proof can be needed to demonstrate that the corporation tax is not uniform. However, if it be urged the word "uniform" does not mean "equal," we find in the primary conception of the word "tax"

a requirement for equality. The powers of Congress are limited by the very nature of a free government, limitations respected indeed by all governments save absolute tyrannies, and the right of taxation is subject to these limitations. These are discussed in Cooley on Constitutional Limitations, and his conclusions, found at pages 598, 607, and 615, are briefly:

1. A tax must not be a confiscation of property.
2. Taxes must be both equal and uniform. As all are protected, so all should bear the burden in proportion to the interests secured.
3. Whatever the basis, taxes must be uniform.

And again in the same author's work on taxation, page 54, it is stated that approximate equality inheres in the very nature of the power to tax, whether or not declared in the written constitution. To the same effect when a judge of the Supreme Court of Michigan he stated in an opinion, *People* vs. *Salem*, 20 Mich. 452, at 473:

> "The tax must be laid according to some "rule of apportionment; not arbitrarily or by "caprice, but so that the burden may be made "to fall with something like impartiality upon "the persons or property upon which it justly "and equitably should rest * * * Equality "in the imposition of the burden is of the very "essence of the power itself, and though ab- "solute equality and absolute justice are never "attainable, the adoption of some rule tending "to that end is indispensable."

To the same effect is the decision in *Albany Bank vs. Maher*, 9 Fed., 884.

Congress has no powers save those expressly granted, and its every enactment must be just and impartial.

> Mugler vs. Kansas, 123 U. S., 623, 661;
> Coe vs. Errol, 116 U. S., 517, 524, 529.
> Soon Hing vs. Chowley, 113 U. S., 703, 709.

It may be contended that the discrimination of the present tax is only proper classification, but it is respectfully submitted that the authorities do not bear out this contention, because the decisions permitting reasonable classification stop short of arbitrary and capricious discrimination.

Connolly vs. *U. S. P. Co.*, 184 U. S., 540, at 560, citing and quoting

> G. S. & S. F. Co. vs. Ellis, 165 U. S., 150, 155-65.
> Cotting vs. K. C. S. Y. Co., 186 U. S., 79.

The line is well marked in

> *Am. S. R. Co.* vs. *Louisiana*, 178 U. S., 89,

where the Court said of a statute exempting sugar planters, refining their own sugar, from an excise tax:

> "The discrimination is obviously intended "as an encouragement to agriculture, and does "not deny to *persons* and *corporations* engaged

> "in a general refining business the equal pro-
> "tection of the laws."

If the Act of 1909 is intended to encourage thrift, why tax mutual life insurance companies?

Or, if Congress desired to tax occupations, why exempt persons and firms?

For the right of classification, where it exists, may not be exercised in a spirit of prejudice or favoritism.

Cook vs. *Marshall Co.*, 196 U. S., 274.

And again:

> "The power of classification is conceded,
> "but this will not uphold one that is purely
> "arbitrary. There must be some substantial
> "foundation and basis therefor."

S. A. L. vs. *Seegers*, 207 U. S., at 76.

And in this very connection it is important to note another discrimination against defendant and similar companies. The New York Life Insurance Company transacts business all over the civilized world, approximately one-fourth of its entire business being written outside of the United States; yet by the terms of the law it must pay a tax measured by the volume of its entire business, while foreign corporations, organized in other countries, are assessed for this tax upon the basis of the business done in the United States. This tax, therefore, is neither uniform nor equal in this particular.

No argument is needed to demonstrate that it is absolutely inequitable to levy upon a domestic corporation a heavier tax for business of the same character than upon a foreign corporation. Presumably defendant pays taxes in all foreign countries where it transacts business on the basis of the volume of such business; yet under the present law it will be required to pay a tax here upon the business upon which it has already paid a tax abroad, while the foreign corporations in the United States are exempted from this double taxation.

It has been held repeatedly that a State cannot tax property or business permanently beyond its borders by reason of the due process clause in the Constitution.

L., etc., Co. vs. Kentucky, 188 U. S., 385, 398.
U. T. Co. vs. Same, 199 U. S., 194, 209.
W. U. T. Co. vs. Kansas, 216 U. S., 38.
Pullman Co. vs. Same, 216 U. S., at 62.

And the same clause for the same reason renders invalid this attempt of Congress to tax the property and business of the defendant located beyond the United States.

3. *The tax takes property without due process of law.*

The action of Congress, then, in taxing the defendant while exempting other corporations of the same class, doing the same business, finds no warrant in the Constitution and is in express defiance not only of the uniformity clause, but also of the provisions of the Fifth Amendment, prescrib-

ing due process of law if private property be taken for public use. This Amendment, adopted in the fear that there might be abuse of the taxing power (*McCulloch* vs. *Maryland*, 4 Wheat., 433), provides that no person shall be deprived of property without due process of law.

In the *Sinking Fund Cases*, 99 U. S., 700, 718, this Court said:

> "The United States, * * * equally with the "States, are prohibited from depriving per- "sons or corporations of property without due "process of law."

And in a recent case this Court held, *Traction Co.* vs. *Mining Co.*, 196 U. S., 239, 251-2:

> "It is fundamental in American jurispru- "dence that private property cannot be taken "by the Government, *National* or State, ex- "cept for purposes which are of a public char- "acter, although such taking be accompanied "by compensation to the owner. That prin- "ciple grows out of the essential nature of all "free governments."

The reasoning upon which the rule so expressed finds its basis is strikingly illustrated by two cases decided in 1874, both of which have been frequently cited with approval and followed in this Court:

> Lowell vs. Boston, 111 Mass., 454.
> Loan Ass'n vs. Topeka, 20 Wall., 655.

In the former case it was said, page 461:

> "The principle of this distinction is funda- "mental. It underlies all government that is "based upon reason rather than upon force.

"* * * This power, when exercised in one "form, is taxation; in the other is designated "as the right of eminent domain. The two "are diverse in respect of the occasion and "mode of exercise, but identical in their "source, to wit: the necessities of organized "society; and in the end by which alone the "exercise of either can be justified, to wit: "some public service or use."

In the latter case this Court, speaking by Mr. Justice Miller, said, page 663:

"The power to tax is, therefore, the strong- "est, the most pervading of all the powers of "government, reaching directly or indirectly "to all classes of the people. * * * This power "can as readily be employed against one class "of individuals and in favor of another, so as "to ruin the one class and give unlimited "wealth and prosperity to the other, if there "is no implied limitation of the uses for which "the power may be exercised."

In *Hurtado* vs. *Cal.*, 110 U. S., 516, at 535, the Court said:

"But it is not to be supposed that these "legislative powers are absolute and despotic, "and that the amendment prescribing due pro- "cess of law is too vague and indefinite to "operate as a practical restraint. It is not "every act, legislative in form, that is law. "Law is something more than mere will ex- "erted as an act of power."

Therefore this Court has held again and again that process of law is only due when it operates on all alike, saying:

> "Due process of law * * * is secured by "laws operating on all alike, and not subject- "ing the individual to an arbitrary exercise "of the powers of government unrestrained "by the established principles of private rights "and distributive justice."
>
> Leeper vs. Texas, 139 U. S., 462, 468.
> Giozza vs. Tiernan, 149 U. S., 657, 662.
> Caldwell vs. Texas, 137 U. S., 692, 697.
> Bank vs. Okely, 4 Wheat., 235, 244.

Under these decisions it is apparent that an excise offends this provision of the Constitution when it taxes the defendant on one basis, foreign corporations doing the same business on an entirely different and more favorable basis, while it exempts entirely a large number of corporations doing exactly the same business, on the same lines, and governed by the same laws.

4. *The law creates a favored class.*

The corporations so exempted are clearly the object of undue favoritism. They are all private companies or associations in which the public as a whole has absolutely no concern. They are all composed of individuals united for a special business and they differ in no one particular from the defendant. They are all organized under State laws and deprive no power, privilege or franchise from the Federal Government.

The constituents of the corporation, the citizens

who compose it, are the real parties in interest, and on behalf of the citizens who compose the defendant it is respectfully urged that Congress has no right or power to discriminate between the defendant and the favored corporations so exempted. If classified it may be said that these are associations for the encouragement of thrift and providence. So is the defendant. Some of the exempted corporations have no stock. Neither has the defendant. If a company is to be favored because it is operated upon the mutual plan, why must the defendant pay a tax? Some of the corporations so exempted have stock of various kinds, differing in no respect whatever from an ordinary banking institution making large profits and distributing the same to their shareholders. Upon what Constitutional theory in regard for due process of law are such corporations exempted and the defendant taxed, when the defendant has no stock and, in the proper sense of the word, never makes a penny of profit? Indeed, if the method of computation was the same for insurance companies as for banks and industrial companies, no insurance company would be required to pay the tax, *because in every instance what the law in the case of the insurance company denominates "net income" is in reality only an over-payment upon the part of the policy holders, which is returned yearly to the policy holders, by the apportionment of surplus earnings, in cash or credit.*

Accordingly, we repeat, why must the defendant pay this tax and the favored corporations escape? The only logical reply would seem to be that Congress by some inscrutable process of Constitutional interpretation has been led to bestow a prefer-

ence on savings banks, building societies and fraternal orders over conservative insurance companies, no matter if the latter are mutual. The present tax is the first step and if it is sustained we may properly anticipate that it will be followed by others ultimately looking to the extinction of corporations like defendant, and the increase and enlargement of building societies and fraternal orders with fanciful names. That the Constitution of the United States permits such a course of stupendous folly is incredible.

In the *Pollock* case Mr. Justice Field said in discussing this limitation upon the taxing power:

> "This * * * forbids the imposition of "taxes which are unequal in their operation "upon similar kinds of property, and neces- "sarily strikes down the gross and arbitrary "distinctions in the income law as passed by "Congress. The law, as we have seen, dis- "tinguishes in the taxation between corpor- "ations by exempting the property of some "of them from taxation and levying the tax "on the property of others when the corpor- "ations do not materially differ from one "another in the character of their business "or in the protection required by the gov- "ernment. *Trifling differences in their "modes of business, but not in their results, "are made the ground and occasion of the "greatest possible differences in the amount "of taxes levied upon their income, showing "that the action of the legislative power upon "them has been arbitrary and capricious and "sometimes merely fanciful."*

IV.

If this is a tax on the right to exist of the corporation subjected thereto, it is not an excise tax within the meaning of Section 8, Article I, of the Constitution, and is therefore void.

There are three distinct positions which can be taken with reference to this law, either it is (1) an income tax, or (2) a tax upon a "calling or occupation"—"an excise" or (3) *a tax upon the form* in which the business is done—*a tax whose incidence is determined* not by what is manufactured, or sold, not by the business or occupation which is carried on, but *by the form of organization* for the carrying on of *any* kind of business.

The first and second positions are already found untenable, since as an income tax the law is clearly in violation of the principles established by the Pollock case, while as a tax upon business, the law with equal clearness violates every principle of excise taxation that such a tax must fall with substantial equality and uniformity upon all persons or corporations engaged in the business which is the object of the excise.

There remains then the far more subtle question of the validity of the law *as levying a tax upon the use of that certain form* in which countless different groups of individuals having organized, each to carry on its own particular business, while in every instance the business carried on by any particular group is totally exempt from taxation under this particular law unless carried on through the instrumentality of the particular form designated in this law.

No matter with what disguise or subtle phraseology the law is veiled, *its true interpretation*,—if we may paraphrase the words of Mr. Justice Moody,—*will be found in the determination of the end accomplished by the taxation and its actual and substantial purpose* and *effect*.

Behind the veil of "a special excise tax with respect to the carrying on or doing business" is revealed *a law which*, in its substance *purposes and effects to tax*, not some certain classes of business which may be carried on in any form, but *a certain particular form of carrying on any business—to tax*, in brief, *the use of the corporate form of organization*, no matter to what business or occupation that use is applied.

Thus revealed, it must be conceded that the law is at once novel, and revolutionary in its scope. No other law like it ever found its place upon the Federal statute book. Yet laws like this in "substantial purpose and effect"—but without disguise—are written in the statute books of every sovereign State of these United States.

Thus to the issue of the constitutionality of this law, the question at once becomes pertinent, *from what source did any group of individuals obtain the right to use this corporate form of organization over which this Federal law now seeks to assert the power of taxation?*

And the answer is—from the individual sovereign State.

The right to use this form—the right to exist,—or, as Mr. Justice Field put it, *"The right given by the State to two or more persons of being a corporation*, that is, of doing business in a corporate capacity and *not* the privilege of franchise which when incorporated, the company may exercise,"

(Home Ins. Co. vs. New York, 134 U. S. * *, 599), is granted by the sovereign power of the State by which the corporation is created and rests in the individuals who at any given time constitute the corporation.

This right to be a corporation is the right granted to the persons constituting the same to exercise certain of the rights and powers of natural persons. By the power of the State the individuals who organize a corporation are endowed with the ability to constitute an artificial person possessed of such powers of the natural person and of a prospective term of life as by the State prescribed.

The right of this artificial person to live and move and have a being is just as absolute under the power and protection of the State as is the right of the natural person so far as the lives of the two are in common.

Mr. Justice Field says further regarding this point:

> "The granting of such right or privilege rests "entirely in the discretion of the State, and, "of course, when granted, may be accompanied "with such conditions as its legislature may "judge most benefitting to its interests and "policy. *It may require as a condition of the "grant of the franchise, and also of its con-"tinued exercise,* that the corporation pay a "specific sum to the State each year or month, "or a specific portion of its gross receipts, or "of the profits of its business, or a sum to be "ascertained in any convenient mode which it "may prescribe. The validity of the tax can in "no way be dependent upon the mode which the "State may deem fit to adopt in fixing the

"amount for any year, which it will exact for "the franchise. No constitutional objection "lies in the way of a legislative body prescrib- "ing any mode of measurement to determine "the amount it will charge for the privilege it "bestows."

Have the States ever surrendered to the Nation their own prerogatives of creating this form of life, these bodies called corporations, of protecting the right to live of these corporations by them created, of securing from them in return for and as a condition of their continued existence a revenue in the form of a franchise tax?

Let us turn for a moment from the question of principle involved to the practical results.

In the State of New York, as shown by a recent message of the then Governor, now Mr. Justice Hughes, the revenue from the corporation franchise tax was over $9,000,000, nearly one-third of the entire amount collected by the State.

Already we find urged upon the Congress, the passage of a law for Federal incorporation. The desirability of such a law for certain corporations engaged in interstate commerce is not at issue.

But, if this law be valid, the possibilities resulting from its passage are as clear as the fate of state bank note circulation when the Federal Government determined upon the advisability of its elimination. There, in that instance, it was held that the State had expressly granted the right, but here in the absence of any such express grant by the States, can it be held that under the grant of power to levy excise, they surrendered to the Federal Government the power to destroy the existence, which they themselves in the exercise of

their prerogatives as independent sovereign States have created and fostered, and from which they derive so large a portion of the income needed for their own welfare?

In the words of Mr. Justice Brewer, at page 448, in the South Carolina case, cited infra:

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when it was adopted it means now."

At the time of the adoption of the Constitution a franchise was defined as "a royal privilege, or a branch of the King's prerogative subsisting in the hands of a subject."

Cal. vs. Pac. R. R. Co., 127 U. S., 1.

This Court has defined a franchise as a "special privilege conferred by the Government, which does not belong to the citizens generally by common right."

Augusta Bk. vs. Earle, 13 Pet., 595.

In New York the definition has been stated as follows: "A franchise is a branch of the sovereign "power of the State subsisting in a person or a "corporation by a grant of the State.'

> R. H. R. R. Co. vs. N. Y. R. R. Co., 44 Hun, 206, at 212; affirmed and approved 110 N. Y., 128.

The distinction—so clearly indicated by Mr. Justice Field in the citation supra from the *Home*

Insurance case—and recognized likewise in Memphis R. R. Co. vs. Comm., 112 U. S., 619; Julian vs. C. T. Co., 193 U. S., 106; Vicksburg vs. Water Co., 202 U. S., at 464—between a franchise owned by a corporation, as for example a railroad or telegraph franchise, and *the franchise of existence* is vital to the determination of the issues here involved.

For here the Federal Government purposes, by this law, under the guise of an "excise," to tax this franchise of existence, granted to corporations by the several States; *seeks here to determine the amount* IT WILL CHARGE *for the privilege* IT DID NOT BESTOW.

Can any such construction of the word "excise" as used in Section 8 of Article I, be maintained?

In *Spreckles* vs. *McClain*, 192 U. S., 397, the definition of "excise" was before the Court and the Government there contended, page 405:

> "That the tax is *distinctly an excise* and in-
> "direct, and, so considered, it is uniform; that
> "it cannot be viewed as direct under the de-
> "cision of this Court or under any authorities,
> "judicial or economic, (a) *because* it does not
> "fall upon persons or property or incomes, ex-
> "cept in the most remote and indirect senses;
>
> "(b) because it falls upon a calling or occupa-
> "tion or the gains therefrom; (c) because it
> "really operates upon the operation of an in-
> "dustry, the exercise of a right, the use of prop-
> "erty, upon the business energies or activities;
> "(d) because the incidence of the tax can be,
> "and is, shifted and passed on, and, while im-
> "mediately paid for by the refiner, is ulti-
> "mately paid by the consumer."

The Government there relied on that meaning of the word "excise," which was most assuredly in the minds of the framers of the Constitution, who considered such an impost a duty upon use of property, upon consumption, a tax which, by non-user or refraining from consumption, the individual subject of the taxing power may avoid.

A comparison of Sec. 38 of the present law, Sec. 27 of the Act of 1898, and words of Mr. Justice Harlan in the *Spreckles* case, clearly reveals the distinction between the validity there, and the invalidity here.

Sec. 27 read:

> "That *every person, firm, corporation*, or "company *carrying on or doing the business of "refining petroleum or refining sugar*," etc.

Mr. Justice Harlan said of this at page 411:

> "The contention of the Government is that the tax is not a direct tax, but only an excise "imposed by Congress under the power to lay "and collect excise which shall be uniform "throughout the United States, Art. I, Sec. 8. "*Clearly the tax is* not imposed upon gross "annual receipts as property, but *only in re-"spect of carrying on or doing the business of "refining sugar.*"

Sec. 38 of the present Act reads:

> "That *every corporation* * * * shall be sub-"ject to pay annually a special excise tax *with "respect to the carrying on or doing business "by such corporation*" * * *.

This is not taxation of any business, *it is taxaction of the instrumentality through which the*

business is done, and *that instrumentality is the creation of the state in the exercise of its sovereignty*. There is nothing here which "can be and is, shifted and passed on." The corporation so taxed must submit to and pay the tax itself. It cannot add it to the price of the article manufactured or sold, for the firm or individual not subject to the tax would then undersell and the tax is not within any sound definition of an excise.

Though the form be ever so exact to the form of a valid "excise," it is the substance which the Court will look to, and the substance remains, not a tax upon any trade or calling, upon the use or consumption of any species of property, but an attempt upon the part of the Federal Government to "require as a condition * * * of its continued existence * * * that the corporation (*created by the State*) pay a specific sum" * * * *to the United States.*

For the Federal Government to levy a tax of this nature on the very right to exist of a corporation created by the State is to impair one of the sovereign prerogatives of the State, and this the Federal Government cannot do.

> Texas vs. White, 7 Wall, 700.
> Collector vs. Day, 11 Wall., 113, 127.
> Pollock vs. Trust Co., 157 U. S., 584.
> So. Car. vs. U. S., 199 U. S., 453.

In a case involving a somewhat similar question the Court said, West River Bridge Co. vs. Dix, 6 How., 507, 548, that a contract of incorporation *"may be taxed by the government under which it is held, though not by other governments so as to impair or obstruct it."*

This conclusion necessarily follows from the principle that the two governments, State and Federal, exist side by side and neither can interfere with the other.

> McCullough vs. Maryland, 4 Wheat., 316.
> California vs. Pac. Ry. Co., 127 U. S., 1.

The point was discussed in Ambrosini vs. U. S., 187 U. S., 1, holding the Federal war revenue stamp tax inapplicable to bonds required from liquor shops in Illinois. The Court said, page 8:

> "The question is whether the bonds were "taken in the excise of a function strictly be- "longing to the State and city in their ordi- "nary governmental capacity and we are of "the opinion that they were, and that they "were exempted as no more taxable than li- "censes."

Examining all the decisions cited we find the key-note to be this: Where a right granted by a State is in derogation of its sovereignty, Congress has the power to tax; where a right granted by a State is in exercise of its sovereignty, Congress has no power to tax. This contrast is clearly established by the *Ambrosini* and *Knowlton* vs. *Moore* cases. In the former the right discussed was in excise of sovereignty and not taxable; in the latter the right discussed was in derogation of sovereignty and taxable.

In *South Carolina* vs. *United States*, 199 U. S., 437, the Court held that State appointed liquor dealers must pay an excise tax on that occupation on the ground that if the State chose to engage in

such business, private in its nature and not a function of its sovereignty, it must do so on the same terms as any person and was subject to the taxing power of the Nation.

So if a State or City had been engaged in the business of refining sugar or petroleum, it would have been subject to the excise tax "in respect of carrying on or doing the business" of refining sugar or petroleum under Sec. 27 of the Act of 1898 in exactly the same manner as any person, or firm or corporation created by the State.

Thus the South Carolina case throws into clear relief the distinction between an excise, levied upon a business no matter by whom transacted, and this attempt to tax the privilege of existence, bestowed upon corporations by the State.

Can it ever be urged, that such a tax was within the contemplation of the men who drafted the Constitution or of the States which ratified its adoption?

Did the States, when they surrendered to the Federal Government the right to levy duties upon imports and excises upon trades or callings—taxes in other words upon use and consumption,—did they ever dream that this clause of their grant would some day be invoked as a basis for a tax upon the right of existence granted by themselves?

The old definition of an excise carries with it the suggestion of the greatest danger which exists in this law, the most potent argument against its validity.

An excise tax has always been a tax which could be avoided by non-user. *This so-called excise tax,* if it shall be sustained, *can be avoided in but one way, not by non-user but by non existence.*

The corporation cannot cease to use the privilege granted by the State save only as it ceases to exist.

The corporations are the creatures of the several States, to them they owe the very right to their existence, the right to be.

In the language of Mr. Justice Field, quoted in Plummer vs. Coler, 178 U. S., at page 129, "the power of the State over the corporate franchise *and the conditions upon which it shall be exercised* is * * * ample and plenary * * *."

The *State—the sovereignty which bestows such right of existence*—can alter, can prescribe the terms of the continued existence of its created subjects, can if it so wills, destroy such existence.

And these rights it exercises independent of the Federal Government.

The determination of the issue raised by the question whether the present tax is a valid excise on the right to exist of a corporation created by the State is far reaching and momentous in consequence. On this decision depends, in a most important degree, the separate and independent condition of the States, as established by the Constitution.

Mr. Justice Brewer at page 453, in the South Carolina case, quotes at length from the opinion of Mr. Chief Justice Chase in Texas vs. White, 7 Wall., 700:

> "Not only, therefore, can there be no loss of "separate and independent autonomy to the "States, through their union under the Con-"stitution, but *it may be not unreasonably said "that* the preservation of the States, and *the "maintenance of their governments*, are as "*much within the design and care of the Con-*

"*stitution as the preservation of the Union and*
"*the maintenance of the National Government.*
"The Constitution, in all its provisions, looks
"to an indestructible Union, composed of in-
"destructible States."

And again, from the opinion of Mr. Justice Nelson in The Collector vs. Day, 11 Wall., 113:

"It is admitted that there is *no express pro-*
"*vision in the Constitution that prohibits the*
"*General Government from taxing the means*
"*and instrumentalities of the States,* nor is
"there any prohibiting the States from taxing
"the means and instrumentalities of that Gov-
"ernment. *In both cases the exemption rests*
"*upon necessary implication, and is upheld by*
"*the great law of self-preservation;* as any gov-
"ernment, whose means employed in conduct-
"ing its operations, if subject to the control of
"another and distinct government, can exist
"only at the mercy of that government. *Of*
"*what avail are these means if another power*
"*may tax them at discretion?*"

Since there is no constitutional limit to the amount of an excise tax, it follows, if this tax be valid, the Federal Government in its discretion may tax State corporations out of existence and thus deny to the State the exercise of one of its most valued prerogatives—the right to create corporations.

It is submitted that under the Constitution and the many decisions of this Court interpreting the powers granted to the Federal Government, no such power as this was ever granted by the several States.

V.

The penalties prescribed by the Act are unconstitutional.

In the attempt to carry this unconstitutional tax into effect Congress has adopted an unconstitutional method. The administrative feature of the Act requires all corporations thereby taxed to produce and disclose their private books and papers at the request of the Federal authorities, with the view of subjecting them to the penalty imposed by the Act. That this provision offends the provisions of Articles IV and V of the Amendments to the Constitution is apparent on its face.

Boyd vs. *U. S.*, 116 U. S., 627, passim.

A similar provision of the tax law heretofore discussed by this Court on other features in *People* vs. *Reardon*, 204 U. S., 152, has recently been held by the New York Court of Appeals to be unconstitutional for this very reason, and the Court said (*People* vs. *Reardon*, 197 N. Y., 236-244):

> "This kind of an inquisition and the at-
> "tempt to secure from an individual evi-
> "dence which may be used to convict him
> "of a crime or to forfeit his property comes
> "well within the principles which have been
> "applied to the interpretation of the Constitu-
> "tion."

See also:

> Robson vs. Doyle, 191 Ill., 566;
> Emery's Case, 107 Mass., 172;

Counselman vs. Hitchcock, 142 U. S., 562;
People vs. Forbes, 143 N. Y., 219;
People vs. O'Brien, 176 N. Y., 253.

SUMMARY.

The argument that the law is unconstitutional may be summarized as follows:—

1. The tax imposed is an income tax pure and simple, for, although the name is changed, the Court will regard the substance rather than the name. The tax is therefore invalid under the decisions of the Court in the Pollock case.

2. Considered as an excise the tax is not uniform. It does not apply to all of a class alike, neither is it imposed on all of a class throughout the United States, differing in its application in New York and Massachusetts, as has been shown. It is therefore invalid.

3. The tax is not equal on all members of the classes it seeks to reach, exempting without basis some and taxing others. It is therefore invalid.

Loan Ass'n vs. *Topeka*, 20 Wall., 655.

4. In the same way the tax offends the due process clause of the Constitution. It in effect assesses certain corporations for the benefit of others which are exempted. It is therefore invalid.

Traction Co. vs. *Mining Co.*, 196 U. S., 239, at 251.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]457

CATHERINE CARY COOK, HARRIET HUNTINGTON COOK, AND ELLENOR RICHARDSON COOK, BY H. R. COOK, THEIR GUARDIAN AND NEXT [illegible],
APPELLANTS,

vs.

BOSTON WHARF COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED [illegible], 1893.

(20,000)

(22,045)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 819.

KATHERINE CARY COOK, HARRIET HUNTINGTON COOK, AND ELLENOR RICHARDSON COOK, BY ANNA H. R. COOK, THEIR GUARDIAN AND NEXT FRIEND, APPELLANTS,

vs.

BOSTON WHARF COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 2, 1910.

1 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a Circuit Court of the United States for the First Circuit, Begun and Holden at Boston, Within and for the District of Massachusetts, on Wednesday, the Twenty Third Day of February, the Third Tuesday of February Being a Legal Holiday, in the Year of our Lord One Thousand Nine Hundred and Ten.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 673. Equity Docket.

KATHERINE C. COOK et al., Complainants,
v.
BOSTON WHARF COMPANY et al., Defendants.

The Bill of Complaint in this cause was filed in the clerk's office on the twentieth day of December, A. D. 1909, and was duly entered at the October Term of this Court, A. D. 1909, and is in the words and figures following:

2 *Bill of Complaint.*

(Filed Dec. 20, 1909.)

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

Katherine Cary Cook, Harriet Huntington Cook and Eleanor Richardson Cook, of Hartford, Connecticut, by Annah H. R. Cook, their duly appointed Guardian and next friend, and all citizens of the State of Connecticut, bring this their bill against the Boston Wharf Company, a corporation organized and existing under the laws of the State of Massachusetts, a citizen of the State of Massachusetts, and having a usual place of business in Boston, in said State, Edwin F. Atkins, of Belmont in said State, President and Director of said Company, Moses Williams, of Brookline in said State, Vice-President and Director of said Company, Joseph B. Russell, of Cambridge in said State, Treasurer and Director of said Company, Charles T. Russell, of Cambridge in said State, Assistant Treasurer and Director of said Company, and Edmund D. Codman, Solon O. Richardson, Jacob W. Pierce and Frederic E. Snow, all of Boston in said State, Directors of said Company, all the above named being citizens of said State of Massachusetts.

And thereupon your orators complain and say as follows:

1. That they respectively are holders of fifty (50) shares each of the capital stock of the respondent, Boston Wharf Company, a cor-

poration duly organized and existing by virtue of a special Act of the legislature of the Commonwealth of Massachusetts, passed in the year 1836, and Acts in amendment thereof.

3 2. That the total capital stock of the said Respondent, Boston Wharf Company, already issued and outstanding, consists of one million two hundred thousand dollars ($1,200,000) divided into sixty thousand (60,000) shares of the par value of twenty dollars ($20) each.

3. That by virtue of the said Act of the Legislature of the Commonwealth of Massachusetts, passed in the year 1836, and Acts in amendment thereof, the said Respondent, Boston Wharf Company, is authorized to take and hold all or any part of certain lands and flats with their privileges and appurtenances lying within the limits of the City of Boston in said Commonwealth of Massachusetts, whereof the said Respondent, Boston Wharf Company, may legally acquire the property from the lawful owners of the same; to receive dockage and wharfage for vessels laid at its wharves, and, conformably to the provisions of such by-laws as shall from time to time be established by it, to make any conveyances of its corporate property, and lease, manage and improve its property in whatever manner shall be deemed expedient by it.

4. That the property and assets of the said Respondent, Boston Wharf Company, at the present time amount to more than five million dollars ($5,000,000), all of which said sum is invested in real estate.

5. That the net profits or income of the said Respondent, Boston Wharf Company, during the year ending December 31, 1908, as shown by its annual report submitted to its shareholders, amounted to the sum of two hundred twenty-three thousand dollars ($223,000) above all ordinary and necessary expenses actually paid within the year out of the income of the said Respondent, Boston Wharf Company, in the maintenance and operation of its business and properties, all sums paid for taxes imposed under the authority of the United States of America or the Commonwealth of Massa-

4 chusetts, all sums charged to depreciation of property, all interest actually paid within said year ending December 31, 1908, on its mortgage indebtedness, and after further deducting the sum of five thousand dollars ($5,000) from the gross income of said Respondent, Boston Wharf Company.

6. That under and by virtue of the alleged authority of the provisions of Paragraph 3 of Section 38 of an Act of Congress of the United States, entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for Other Purposes," approved August 5, 1908, the Respondent, Boston Wharf Company, is liable on or before the 1st day of March, 1910, to make a true and accurate return under the oath or affirmation of its President, Vice-President or other principal officer, and its Treasurer or Assistant Treasurer, to the Collector of Internal Revenue for the Third District of Massachusetts, setting forth:

a. The total amount of the paid up capital stock of the said Boston Wharf Company outstanding on December 31, 1909;

b. The total amount of the bonded and other indebtedness of the said Boston Wharf Company on December 31, 1909;

c. The gross amount of the income of the said Boston Wharf Company received by it from all sources during the year ending December 31, 1909;

d. The total amount of all the ordinary and necessary expenses actually paid out of the earnings of the said Boston Wharf Company in the maintenance and operation of its business and properties within the said year ending December 31, 1909, stating separately all charges by way of rentals or franchise payments required to be made by it as a condition to the continued use or possession of its property;

e. The total amount of all losses actually sustained by the said Boston Wharf Company during the year ending December 31, 1909, not compensated by insurance or otherwise, stating
5 separately any amounts allowed for depreciation of property;

f. The amount of interest actually paid by the said Boston Wharf Company within the year ending December 31, 1909, on its bonded or other indebtedness to an amount not exceeding its paid up capital stock;

g. The amount actually paid by said Boston Wharf Company within the year ending December 31, 1909, for taxes imposed under the authority of the United States or the Commonwealth of Massachusetts;

h. The net income of the said Boston Wharf Company after making all the deductions authorized in paragraphs 2 and 3 of Section 38 of the said Act of Congress above mentioned.

7. That by virtue of the before mentioned Act of the Legislature of the Commonwealth of Massachusetts, passed in the year 1836, and the By-Laws of the said Respondent, Boston Wharf Company, regularly and lawfully adopted by the shareholders of said Respondent, Boston Wharf Company, the management of the stock, property, affairs and concerns of the said Respondent, Boston Wharf Company, is committed to its Board of Directors; and the management of its financial affairs to its Treasurer; and that under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States of America, entitled "An Act to provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and for Other Purposes," approved August 5, 1909, Section 38 of said Act, the Respondent, Boston Wharf Company, is liable to pay, and that the Respondent, Treasurer of said Respondent, Boston Wharf Company, intends to cause to be paid to the Commissioner of Internal Revenue for the United States of America, for the use of the said United States, on or before the 30th day of June, 1910, and on or before the 30th day of June in each year thereafter, a tax of one per cent. (1%) for the year ending
6 December 31, 1909, and for each year ending December 31 thereafter, upon the entire net income of the said Respondent, Boston Wharf Company, over and above five thousand dollars ($5,000) received by it from all sources during such year.

8. And your Orators further represent that the said provisions of Section 38 of the said Act of Congress above referred to, providing for a tax of one per cent. (1%) upon the entire net income over and above five thousand dollars ($5,000) of every corporation, joint stock company, or association, organized for profit, and having a capital stock represented by shares, are unconstitutional, null and void as to the said Respondent, Boston Wharf Company, a Corporation deriving its income wholly from real estate, for the following reasons:

a. The provisions of Section 38 of said Act of Congress above mentioned originated in the Senate of the United States, and were concurred in by the House of Representatives subsequent thereto. Whereas it is provided by the Constitution of the United States, Article I, Section 7, that all measures for raising revenue shall originate in the House of Representatives.

b. The said provisions of Section 38 of said Act of Congress above mentioned constitute a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, Section 1 thereof, in that they deprive the said Respondent, Boston Wharf Company, and its shareholders, of their property without due process of law; and further, that the said provisions impose no tax of this kind upon individual owners of real estate, and therefore that said provisions deny the said Respondent, Boston Wharf Company, and its shareholders, the equal protection of the laws.

c. The said provisions of Section 38 of said Act of Congress above referred to constitute a direct tax in respect of the property held and owned by the said Respondent, Boston Wharf Company. Whereas it is provided in the Constitution of the United States, Article I, Section 9, that no capitation or other direct tax shall be laid by Congress unless in proportion to the census or enumeration in said Constitution directed to be taken.

d. That if said provisions of Section 38 of said Act of Congress above referred to, do not constitute a direct tax on the property held and owned by the said Respondent, Boston Wharf Company, they must be a tax upon the franchise of said Company, and Congress has no power under the Constitution of the United States to impose a tax upon franchises granted by a sovereign State of the Union.

9. That they have requested said Respondent, Treasurer of said Boston Wharf Company, both orally and in writing, to omit and refuse to pay said tax provided for in Section 38 of said Act of Congress above mentioned, and to refrain from voluntarily making any list, return or statement on behalf of the said Respondent, Boston Wharf Company, to the Collector of Internal Revenue for the Third District of Massachusetts.

10. That the said Respondent, Russell, Treasurer of the said Boston Wharf Company, has not complied with your Orators' request, but on the contrary he, with the other Respondents, Directors of said Company, as she is informed and believes, have resolved and determined to comply with all and singular the provisions of said Section 38 of the said Act of Congress above referred to, by causing the Respondents the President or Vice-President, Treasurer or Assistant Treasurer of the said Respondent, Boston Wharf Com-

pany, to make the said return to the Collector of Internal Revenue for the Third District of Massachusetts, as provided in Paragraph 3 of Section 38 of the said Act of Congress above mentioned, and by causing to be paid to the Commissioner of Internal Revenue for the United States of America, for the use of the said United
8 States, the said tax upon all the net profits or income of the said Respondent, Boston Wharf Company, as set forth in Paragraph 7 of this Bill.

11. That if the said Respondents, Directors of the said Boston Wharf Company, shall cause the Respondent, Boston Wharf Company, to pay the said tax out of its gains, income and profits, as they have proposed and declared their intention of doing, they will diminish the assets of the said Respondent, Boston Wharf Company, and lessen the dividends to be derived from its shares by its shareholders, and will thereby lessen the value of the said shares; and that a voluntary compliance with the provisions of said Section 38 of the said Act of Congress above mentioned will expose the said Respondent, Boston Wharf Company, to a multiplicity of suits by and on behalf of its numerous shareholders, and that such numerous suits will work irreparable injury to the business of the said Respondent, Boston Wharf Company, and will subject it to great and irreparable damage, to the great and irreparable damage of your Orators and all the shareholders of the said Respondent, Boston Wharf Company.

12. That the capital stock of the said Respondent, Boston Wharf Company, is divided among a large number of persons, who, as such shareholders, constitute a large body; that this Bill is filed for an object common to all of said shareholders, and that your Orators therefore bring this Bill not only in their own behalf as shareholders of said Respondent, Boston Wharf Company, but also as representatives, and on behalf of, such of the other shareholders of said Respondent, Boston Wharf Company, similarly situated and interested, as may from time to time choose to intervene and become parties to this Bill.

13. That they are now the owners and registered holders of one hundred fifty (150) shares of the capital stock of the said
9 Respondent, Boston Wharf Company, of a value exceeding the sum of Fifteen thousand dollars ($15,000), and that they became entitled to said stock upon the first of January, 1907, under the will of George Morey Richardson, late of the State of California; and that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

14. That the said Respondent, Boston Wharf Company, is not engaged in interstate commerce.

15. And your Orators further represent that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of costs, the sum of two thousand dollars ($2,000), that said suit arises under the Constitution or laws of the United States, and that said suit is furthermore a controversy between citizens of different States.

Wherefore your Orators pray:

1. That it may be decreed that the provisions of Section 38 of th said Act of Congress above mentioned, providing for the impositio of a tax of one per cent. (1%) upon the entire net income over an above five thousand dollars ($5,000) of every corporation, join stock company, or association, organized for profit; and having capital stock represented by shares are unconstitutional, null an void, so far as they may apply to the said Respondent, Bosto Wharf Company, a Corporation the property of which consis wholly of real estate, and the income of which is derived wholl from real estate.

2. That each and every one of the said Respondents may be perpe ually restrained from complying with the provisions of Section 3 of the said Act of Congress above mentioned, by making any list returns or statements, to the Collector of Internal Revenue for th Third District of Massachusetts, as aforesaid.

10 3. That each and every one of the said Respondents may b perpetually restrained from complying with the provisio of Section 38 of the said Act of Congress above mentioned, by pay ing any tax of one per cent. (1%), on or before June 30, 1909, at any time thereafter, on the net earnings of the said Responden Boston Wharf Company, for the year ending December 31, 1909, t the Commissioner of Internal Revenue for the United States America.

4. That an injunction be issued by this Honorable Court restrain ing and enjoining the Respondents, and each and every one of then from making any list, return or statement, to the Collector of In ternal Revenue for the Third District of Massachusetts, in co formity with Section 38 of the said Act of Congress above me tioned, or taking any steps preliminary to making said list, return statement until the further order of this Court.

5. That this Honorable Court will decree to your Orators the costs of this suit.

6. That your Orators may have such other and further relief the nature of their case requires.

KATHERINE CARY COOK,
HARRIET HUNTINGTON COOK,
ELLENOR RICHARDSON COOK,
By ANNAH H. R. COOK,
Guardian and Next Friend.

STIMSON & STOCKTON,
HARRIS LIVERMORE,
Solicitors and Counsel for Petitioners.

11 STATE OF CONNECTICUT,
Hartford, ss:

HARTFORD, *Dec. 18th*, 1909.

Then personally appeared before me Annah H. R. Cook, th person subscribing to the above bill of complaint, and made oat that the statements subscribed by her are true, except those whic

are alleged to be on information and belief, and as to those, that she believes them to be true.

[SEAL.] J. LINCOLN FENN,
Notary Public.

(My commission expires January 31, 1910.)

12 This cause was thence continued to the present February Term, A. D. 1910, when to wit, February 25, 1910, the following Motion to Amend Bill of Complaint is filed by consent:

Motion to Amend Bill of Complaint.

(Filed by Consent Feb. 25, 1910.)

And now come your orators in the above entitled cause and move to amend their bill of complaint heretofore filed, as follows:

1. By striking out paragraph 3 thereof and substituting the following:

13 "3. That said Respondent corporation was originally chartered among other purposes for the improvement of Boston Harbor and the development of wharf facilities at the port of Boston, as appears from the following Acts of the Legislature of the Commonwealth of Massachusetts:

1836, 259,
1845, 239,
1850, 246,
1852, 171,
1852, 278,
1854, 218,
1855, 455, Section 2,
1863, 209,
1867, 354,
1874, 230,

and particularly by said Act of 1836, 259 (the original charter of said Company), 1854, 218, and 1855, 455, Section 2, which are appended to this Bill of Complaint and marked 'A,' 'B' and 'C' respectively, and to which your Orators beg leave to refer."

2. Paragraph 5, by striking out the date "1908" wherever the same occurs in said Paragraph and substituting therefor the date "1909."

3. Paragraph 6 thereof by substituting for the date "August 5, 1908," "August 5, 1909."

4. Paragraph 8, Section *b*, by striking out the words "Fourteenth Amendment of the Constitution of the United States, Section 1 thereof" and substituting therefor the words "Fifth Amendment of the Constitution of the United States."

By Their Solicitors, FREDERIC J. STIMSON.
LAWRENCE W. STOCKTON.
HARRIS LIVERMORE.

14 "A."

Acts 1836, Chapter 259.

SECTION 1. Cyrus Alger, Hall J. How, Josiah Dunham, their associates and successors, are hereby made a corporation by the name of the Boston Wharf Company, with all the powers and privileges and subject to all the duties, restrictions and liabilities set forth in the 44th chapter of the Revised Statutes passed Nov. 4, 1835.

SECTION 2. The said Corporation may take and hold all or any part of the land and flats with their privileges and appurtenances lying in South Boston, and whereof the said corporation shall legally acquire the property from the lawful owners of the same, that is to say, a parcel of land bounded and described as follows [here follows description]. And the said corporation may receive dockage and wharfage for vessels laid at their wharves; and may conformably to the provisions of such by-laws as shall from time to time be established by them, make any conveyances of their corporate property and lease, manage and improve their said property as they shall deem expedient. And the said corporation may also hold any personal property to an amount not exceeding one hundred thousand dollars.

SECTION 3. The said corporate property shall be divided into 12,000 shares of $500 each and assessments may be made from time to time thereon not exceeding the said sum of $500 on each share, and in case any proprietor shall not pay such assessments as may be laid on his share or shares, the said corporation may cause the same to be sold by public auction after 14 days' notice in one or more daily newspapers published in the city of Boston, and the surplus, if any shall remain after paying the assessments, together with
15 interest and incidental charges, shall upon request be paid over to such proprietor and the purchaser shall be entitled to a certificate of the share or shares so sold: Provided always that all assessments on the shares shall be agreed to by at least ⅔ in number of the votes of proprietors present or represented in writing at any meeting, of which meeting public notice in one or more daily newspapers published in said City of Boston shall be given seven days at least previously thereto.

SECTION 4. Each share in the said corporation shall entitle the proprietor to one vote, provided, however, no proprietor shall be entitled to more votes than ¼ of the whole number of shares.

SECTION 5. Nothing herein contained shall be construed to authorize said corporation to obstruct or encroach upon the channel or in any way to infringe or interfere with the rights of the Commonwealth in any flats in the harbor of Boston, or with the legal rights of any other person or persons.

16 "B."

Acts 1854, Chapter 218.

SECTION 1. The Boston Wharf Company is hereby authorized to extend and maintain its wharf in that part of Boston called South Boston, to the commissioners' line, of solid filling, established by an act entitled "An Act concerning the Harbor of Boston," passed May twenty-fifth, eighteen hundred and fifty-three, and shall have the right to lay vessels at the end and sides of said wharf and receive wharfage and dockage therefor: Provided, however, that this grant shall not be construed to extend to any flats or land lying in front of the flats of any other persons, or which would be comprehended by the true lines of such flats continued to the commissioners' line: and provided, also, that this grant shall not impair the legal rights of any person or corporation whatever; and provided also, that the said wharf shall be bounded on Fore Point Channel by the commissioners' line established by an act entitled "An Act concerning the Harbor of Boston," passed on the seventeenth day of March in the year of our Lord eighteen hundred and forty.

SECTION 2. The Boston Wharf Company, in making the extension and improvements authorized by this act, shall conform to any plan which may be adopted by the commissioners appointed under the authority of the present legislature, for the improvement of the South Boston Flats on the east side of Fore Point Channel.

SECTION 3. The City of Boston shall have the right to lay out such streets, with sewers under the same, as public convenience and necessity may require, on the territory over which the Boston Wharf Company is hereby authorized to construct their wharf: pro-
17 vided, however, that all such streets shall be laid out within one year from the passage of this Act.

SECTION 4. This Act shall not authorize said Company to hold any flats, which shall not be embraced between the two lines of its estate, legally extended, nor to interfere with nor to take compensation for any easement which the Legislature have already granted to any railroad or other corporation in or over said flats.

SECTION 5. The Boston Wharf Company shall pay their proportion of the expenses of making the excavations, set forth in the fifth section of the two hundred and fifty-fourth chapter of the Acts of eighteen hundred and fifty; said proportion to be assessed by the commissioner appointed under said Act.

18 "C."

Acts 1855, Chapter 455, Section 2.

SECTION 2. The Boston Wharf Company shall pay their proportion of the expenses of making the excavations set forth in the fifth section of the two hundred and fifty-fourth Chapter of the Acts of

the year eighteen hundred and fifty, said proportion to be asses
by the commissioner appointed under said act, and shall build su
avenues or streets, as the mayor and aldermen of the City of Bos
may within five years direct, on property thus made, at their o
expense.

On the same day, the foregoing Motion to Amend Bill of Co
plaint is allowed by the Court, the Honorable Francis C. Low
Circuit Judge, sitting.

Also on the same day, the following Demurrer is filed:

Demurrer.

(Filed Feb. 25, 1910.)

The Demurrer of the Boston Wharf Company, Edwin F. Atki
Moses Williams, Joseph B. Russell, Charles T. Russell, Edmund
Codman, Solon O. Richardson, Jacob W. Pierce, and Frederic
Snow to the Bill of Katherine Cary Cook, Harriet Hunting
Cook, and Ellenor Richardson Cook, by Their Guardian An
H. R. Cook.

These respondents, by protestation, not confessing any or all
the matters and things in the complainants' bill of complaint c
tained to be true, in such manner and form as the same are ther
set forth and alleged, do demur to said bill, and for cause of
murrer show that the said complainants have not in and by th
said bill made or stated such a case as entitles them in a court
equity to any discovery from the respondents, or any
19 them, or to any relief against them, or any of them, as
the matters contained in said bill or any of such matters

Wherefore, and for divers other good causes of demurrer appe
ing in the said bill, the respondents demur thereto, and humbly
mand the judgment of this court whether they shall be compelled
make any further or other answer to the said bill; and pray to
hence dismissed with their costs and charges in this behalf m
wrongfully sustained.

By Their Solicitors, GASTON, SNOW & SALTONSTALL

Certificate of Counsel.

I hereby certify that I am solicitor and of counsel for the
spondents in the above-entitled cause, and that, in my opinion,
foregoing demurrer is well founded in point of law and proper to
filed in the above cause.

FREDERIC E. SNOW,
Solicitor and of Counsel for Respondents

Verification.

UNITED STATES OF AMERICA,
District of Massachusetts:

I, Jacob W. Pierce, being duly sworn, depose and say that I am a director of the Boston Wharf Company, and as such am one of the above named respondents, and do further say that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

JACOB W. PIERCE.

Sworn to, before me, at Boston, this twenty fifth day of February, A. D. 1910.

FREDERIC D. WEBSTER,
Notary Public.

20 Also on the same day, this cause is set down for hearing and fully heard by the Court on demurrer, the Honorable Francis C. Lowell, Circuit Judge, sitting, and a memorandum of decision is filed, sustaining said demurrer.

Also on the same day, the following Final Decree is entered:

Final Decree.

Feb. 25, 1910.

LOWELL, *J.*—This cause came on to be heard upon the demurrer of the respondents to the complainants' bill of complaint and thereupon, it is ordered, adjudged and decreed that the demurrer be allowed and that the complainants' bill be and the same is dismissed, with costs to be paid by the complainants to the respondents.

By the Court:

CHARLES K. DARLING, *Clerk.*

From the foregoing Final Decree, the complainants claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, and said appeal is allowed accordingly.

A true record:

Attest:

CHARLES K. DARLING, *Clerk.*

21 *Judge Lowell's Memorandum of Decision.*

(Filed Feb. 25, 1910.)

No question is here involved but that of the constitutionality of the Corporation Tax Act. Under these circumstances, as I am not

prepared to hold the Act unconstitutional, I must sustain the de murrer.

Complainants' Appeal.

(Filed Feb. 25, 1910.)

And now come the Complainants in the above entitled caus and claim an appeal to the Supreme Court of the United States fron the decree of this Honorable Court sustaining the demurrer of th respondents.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Solicitors and of Counsel for Complainants.

The Appeal of the complainants to the Supreme Court of th United States is allowed.

FRANCIS C. LOWELL,
Circuit Judge.

Feb. 25th, 1910.

Assignment of Errors.

(Filed Feb. 25, 1910.)

1. The Court erred in ordering that the demurrer of the respond ents be allowed and in dismissing the bill of the complainants wit costs.

2. The Court erred in not holding that the provisions of Sec tion 38 of the Act of Congress referred to in the complainant's bil are unconstitutional, null and void as to the said respondent, Bosto Wharf Company, for the following reasons:

22 *a.* The said provisions originated in the Senate of th United States and were concurred in by the House of Repre sentatives subsequently thereto. Whereas it is provided by the Con stitution of the United States, Article I, Section 7, that all measure for raising revenue shall originate in the House of representatives.

b. Said provisions constitute a violation of the provisions of th Fifth Amendment of the Constitution of the United States in tha they deprive the said respondent, Boston Wharf Company, and it shareholders of their property without due process of law; and fur ther that the said provisions impose no tax of this kind upon in dividual owners of real estate and therefore that said provisions den the said respondent, Boston Wharf Company, and its shareholder the equal protection of the laws.

c. The said provisions constitute a direct tax in respect of th property held and owned by the said respondent, Boston Whar Company. Whereas it is provided in the Constitution of the Unite States, Article I, Section 9, that no capitation or other direct tax shal be laid by Congress unless in proportion to the census or enumeratio in said Constitution directed to be taken.

d. That if said provisions do not constitute a direct tax on th property held and owned by the respondent, Boston Wharf Com

pany, they must be a tax upon the franchise of said company, and Congress has no power under the Constitution of the United
23 States to impose a tax upon franchises granted by a sovereign State of the Union.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Solicitors and of Counsel for Complainants.

24 *Bond on Appeal.*

(Filed and Approved Feb. 25, 1910.)

Know all Men by these Presents, That we, Annah H. R. Cook, of Hartford, in the States of Connecticut, Guardian of Katherine Cary Cook, Harriet H. Cook, and Ellenor R. Cook, minors, as principal, and Alfred A. Ashman, of Braintree, in the State of Massachusetts, as surety, are held and firmly bound unto the Boston Wharf Company, Edwin F. Atkins, Moses Williams, Joseph B. Russell, Charles T. Russell, Edmund D. Codman, Solon O. Richardson, Jacob W. Pierce and Frederic E. Snow, in the full and just sum of two hundred dollars to be paid to the said Boston Wharf Company, Atkins, Williams, Russell, Russell, Codman, Richardson, Pierce and Snow, their certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of February in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Circuit Court of the United States for the District of Massachusetts in a suit in Equity depending in said Court between Katherine Cary Cook and others, and the Boston Wharf Company and others a decree was entered against the said Katherine Cary Cook and others, and the said Katherine Cary Cook and others having obtained an appeal to remove said cause to the United States Supreme Court, to reverse the decree in the aforesaid suit, and a citation directed to the said Boston Wharf Company and others above named citing and admonishing them to be and appear in the said Supreme Court of the United States, in the city of Washington, D. C., on the third day of March, A. D. 1910.

Now, the condition of the above obligation is such, That if the said Katherine Cary Cook and others shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

ANNAH H. R. COOK, *Guardian,* [SEAL.]
By HARRIS LIVERMORE, *Attorney.*
ALFRED A. ASHMAN. [SEAL.]

Sealed and delivered in presence of
B. G. CONNER.

Approved:
FRANCIS C. LOWELL,
Circ. Judge.

This bond is satisfactory to the respondents and is approved by their counsel.

GASTON, SNOW & SALTONSTALL.

25 *Citation on Appeal.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Boston Wharf Company, a corporation organized and existing under the laws of the State of Massachusetts, a citizen of the State of Massachusetts, and having a usual place of business in Boston, in said State; Edwin F. Atkins, of Belmont, in said State, President and Director of said Company; Moses Williams, of Brookline, in said State, Vice-President and Director of said Company; Joseph B. Russell, of Cambridge, in said State, Treasurer and Director of said Company; Charles T. Russell, of Cambridge, in said State, Assistant Treasurer and Director of said Company, and Edmund D. Codman, Solon O. Richardson, Jacob W. Pierce, and Frederic E. Snow, all of Boston, in said State, Directors of said Company, all the above named being citizens of said State of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* third day of March next, pursuant to an Appeal duly obtained from a decree of the† Circuit Court of the United States for the District of Massachusetts wherein Katherine Cary Cook, Harriet Huntington Cook and Ellenor Richardson Cook, of Hartford, Connecticut, by Annah H. R. Cook, their duly appointed Guardian and next friend, and all citizens of the State of Connecticut, are appellants and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Francis C. Lowell Judge of the Circuit Court of the United States for the District of Massachusetts this twenty fifth day of February, in the year of our Lord one thousand nine hundred and ten.

FRANCIS C. LOWELL,
U. S. Circuit Judge.

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*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

26 *Acknowledgment of Service on Citation on Appeal.*

FEBRUARY 25, 1910.

Service of the within citation is hereby accepted on behalf of the appellees.

GASTON, SNOW & SALTONSTALL,
Solicitors and of Counsel for Appellees.

27 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, Clerk of the Circuit Court of the United States for the District of Massachusetts, within the First Circuit, certify that the foregoing is a true copy of the record and all proceedings of said Circuit Court, in the cause in equity entitled,

No. 673. Equity Docket.

KATHERINE C. COOK et al., Complainants,
v.
BOSTON WHARF COMPANY et al., Defendants.

in said Circuit Court determined, a Memorandum of Decision by Judge Lowell, Complainants' Appeal, the Assignment of Errors, and the Bond on Appeal, and also the original Citation issued upon the appeal of the complainants in said cause, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this twenty eighth day of February, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,045. Massachusetts C. C. U. S. Term No. 819. Katherine Cary Cook, Harriet Huntington Cook, and Ellenor Richardson Cook, by Anna H. R. Cook, their guardian and next friend, appellants, vs. Boston Wharf Company et al. Filed March 2d, 1910. File No. 22,045.

Office Supreme Court U. S.
FILED
MAR 4 1910
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 457

KATHERINE C. COOK ET AL., APPELLANTS,

v.

THE BOSTON WHARF COMPANY ET AL.

MOTION TO ADVANCE CASE FOR ORAL ARGUMENT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. .

KATHERINE C. COOK ET AL., APPELLANTS,

v.

THE BOSTON WHARF COMPANY ET AL.

MOTION TO ADVANCE CASE FOR ORAL ARGUMENT.

Come now the Appellants in the above entitled case and move that this Honorable Court may advance the said case for hearing on March 14, 1910, for the following reasons:

1. That the matters involved in said case concern the constitutionality of the provisions of Section 38 of an Act of Congress, approved August 5, 1909, entitled "An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and for Other Purposes."

2. That this Honorable Court has advanced for oral argument on March 14, 1910, certain other cases involving the constitutionality of said Section 38 of said Act of Congress, one of which cases is entitled "*Gay* v. *Baltic Mining Company et al.*"

3. That the Respondent corporation, The Boston Wharf Company, is chartered to develop the harbor and City of Boston in the State of Massachusetts, and is engaged in business entirely within the State of Massachusetts.

4. That they therefore believe that the said case entitled *Cook et al.* v. *Boston Wharf Company et al.* involves the consideration of questions of law which arise in the said cases already advanced for oral argument, and furthermore involves additional questions of law arising under Section 38 of said Act of Congress above referred to.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Counsel and Solicitors for Appellants.

MAR 9 1910
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

No. 849 457 October Term, 1909.

KATHERINE C. COOK ET ALS.,
APPELLANTS,

v.

THE BOSTON WHARF COMPANY ET ALS.

BRIEF OF THE APPELLANTS, KATHERINE C. COOK et als.

JOHN G. JOHNSON. FREDERIC JESUP STIMSON.

LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
Of Counsel.

BOSTON:
THE BOOKWELL & CHURCHILL PRESS.
1910.

Supreme Court of the United States.

KATHERINE C. COOK *et als.*

v.

THE BOSTON WHARF COMPANY *et als.*

BRIEF OF THE APPELLANTS, KATHERINE C. COOK et als.

I.

Admitting, for the purposes of this paragraph, that Section 38 of the Act of Congress of August 5, 1909, imposes, as it alleges, an excise tax on the doing of certain businesses, it is not "due process of law" within the meaning of the Fifth Amendment to the Constitution of the United States, in that it does not apply to individuals; and that, while it does apply to "associations," it does not apply to partnerships carrying on the same business.

The War Revenue Act of 1898, sustained in

Spreckels, etc., Co. v. *McClain*, 192 U.S. 397,

applied equally to all corporations and persons engaged in the business taxed. Moreover, it applied not, as here, to income derived "from all sources," but to "gross receipts . . . in their respective business." So, even the banknote tax law applied to notes of any *person*, state bank or state banking association "used for circulation and paid out" by national or state banks.

Veazie Bank v. *Fenno*, 8 Wall. 533, 539.

So also as to the statute of Missouri discussed in

Pacific Express Co. v. *Siebert*, 142 U.S. 339, 340,

which applied to "Any person, persons, joint-stock association, company or corporation" doing an express business.

Corporations are persons within the meaning of the Fifth Amendment and the property clauses of the Fourteenth Amendment.

Pembina Mining Co. v. *Pa.*, 125 U.S. 181, 189;
Covington Co. v. *Sandford*, 164 U.S. 578, 592;
Gulf, Colorado & Sante Fe Ry. v. *Ellis*, 165 U.S. 150–154;
Smyth v. *Ames*, 169 U.S. 466, 522,

and, especially as to taxation, see

Railroad Tax Cases, 13 Fed. 722; 18 Fed. 385.
Southern Railway et al. v. *Georgia*, decided by this Court February 21, 1910.
Guthrie on the Fourteenth Amendment, pp. 113, 119.
Mr. Justice Field, in *San Bernardino Co.* v. *Southern Pacific R.R.*, 118 U.S. 417, 422.
N.P. R.R. v. *Walker*, 47 Fed. 681, 686.

"A company lawfully doing business in the State is no more bound by a general unconstitutional enactment than a citizen of the State."

Holmes, J., in *Carroll* v. *Greenwich Ins. Co.*, 199 U.S., 409.

In other words, corporations have all *property* rights guaranteed by the Federal Constitution, though they may not have all the personal liberty rights appropriate to natural citizens, for instance, such as are declared by Article IV., Section 2, Clause 1, of the Federal Constitution. In other respects they are citizens.

In the various constitutions the phrases "due process of law" and "law of the land" are "used interchangeably . . .

but they are synonymous"; the words of the Fourteenth Amendment confer no new rights, but add a Federal guaranty against State action; and both Fifth and Fourteenth Amendments presuppose equality before the law.

Harding v. *People*, 160 Ill. 459; S.C. 32 L.R.A. 445, 447, and cases cited.
Carroll v. *Greenwich Ins. Co.*, 199 U.S. 401, 410.
Mobile R.R. v. *Tennessee*, 153 U.S. 486, 506.
Cooley, "*Constitutional Limitations*," Sixth Edition, pp. 479–483.

"It was not within the power of the States *before* the Fourteenth Amendment to deprive citizens of the equal protection of the laws."

Cooley, *ibid.*, p. 490.

Could the laws supposed by Mr. Justice Brewer in

Gulf, Colorado & Sante Fe Ry. v. *Ellis*, 165 U.S. 150 at p. 155,

have been enacted by the Federal Government under the Fifth Amendment?

The words "due process of law" in the Fifth Amendment have therefore the full meaning and intention more amply expressed in the Fourteenth Amendment by the addition of the words "equal protection of the laws." The latter phrase was but added to make clear, and with special reference to statutes, as the use of the plural in the word "laws" shows. The Fifth Amendment is the modern expression of the famous clause ending with the words "*vel per legem terrae*" in the Magna Carta of King John (Cap. 39), as amplified in the corresponding words in the Magna Carta of Henry III. (Cap. 35) two years later by the addition "*de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis*" after the word "*dissaisietur*," and expressed in modern language by the words "due process of law" in Edward the Third's Confirmation of the Charter (Cap. 3) in 1354. The principle of equality before the law was even anterior to Magna

Carta, dating at least from the Charter of Liberties of Henry II. (1154). For comparison of these phrases, see

Stimson's Federal and State Constitutions of the United States, pp. 75, 80, 90.

Taswell-Langmead, English Constitutional History, Sixth Edition, quoting Coke, pp. 104–107.

Hannis Taylor, Origin and Growth of the English Constitution, Vol. II., p. 3.

Words in the Federal Constitution, as is well known, are to be construed and extended according to their full historical meaning acquired at the time of its adoption.

Cooley, Principles of Constitutional Law, Fourth Edition, p. 387.

Mattox v. *U.S.*, 156 U.S. 237,

Kepner v. *U.S.*, 195 U.S. 100,

and for a historical discussion, see

Stimson's Federal and State Constitutions of the United States, pp. 6, 7 and (as to equality before the law) p. 16.

Unequal taxation, not based upon a reasonable classification, is not "due process of law," and an excise tax imposed on the doing of business (save where imposed as a charter limitation by the sovereignty creating a corporation), like a simple property tax must apply alike to all persons and all corporations engaged in the same business. A franchise tax may be imposed in lieu of or in addition to a simple property tax, but where the tax is not imposed upon the charter to do business as a corporation as such, it must apply equally to corporations and individuals.

II.

If not a simple excise tax on the doing of business it can only be an excise tax on the doing of business *under a corporate charter*. There can be no distinction between this and a tax on

the charter itself. For instance, if the Federal Government may not impose a tax on the amount of the capital stock authorized on the day that a State corporation charter is granted, it may not impose an annual tax on the doing of business thereunder. Neither State nor Nation — governments of equal dignity in their respective spheres — may impose such tax upon each other's corporations, save only so far as they are property taxes imposed by the States, or taxes imposed by the Federal Government in the exercise of functions otherwise constitutional. "The States cannot directly or indirectly burden the exercise by Congress of the powers committed to it by the Constitution, nor may Congress burden the agencies or instrumentalities employed by the States in the exercise of their powers."

Argument of Mr. Solicitor General Hoyt for the Government in *Spreckels Co.* v. *McClain*, 192 U.S. 404.

Collector v. *Day*, 11 Wall. 113–124.

Fifield v. *Close*, 15 Mich. 505, cited with approval in Cooley's Constitutional Limitations, Sixth Edition, p. 592.

A State may not tax the corporate franchise of a Federal corporation,

McCulloch v. *Maryland*, 4 Wheat. 316,

California v. *Central Pacific R.R.*, 127 U.S. 41,

nor may it tax its business if it be a Federal function, such, for instance, as interstate commerce; nor can a State impose a franchise tax even on the stock of corporations incorporated in other States and doing business in the State imposing the tax, if it do not tax its own corporations in the same manner.

Southern Railway v. *Georgia*, *supra*.

Western Union Telegraph Co. v. *Kansas*, 30 S.C.R. 190.

North Dakota v. *Hanson*, 30 S. C. R. 179.

A tax on a wharf company chartered by the State of Massachusetts to develop the harbor and City of Boston is peculiarly a

tax upon an instrumentality of the State. That this Wharf Company was so chartered appears from the following Acts of the Legislature of the Commonwealth of Massachusetts:

Acts 1836, Chap. 259.
Acts 1837, Chap. 70.
Acts 1838, Chap. 118.
Acts 1845, Chap. 239.
Acts 1850, Chaps. 246, 254.
Acts 1852, Chap. 171.
Acts 1852, Chap. 278.
Acts 1854, Chap. 218.
Acts 1855, Chap. 455, Sect. 2.
Acts 1863, Chap. 209.
Acts 1867, Chap. 354.
Acts 1874, Chap. 230.

It was chartered in 1836 "to take and hold all or any part of the land and flats with the privileges and appurtenances lying in South Boston . . . and the said Corporation may receive dockage and wharfage for vessels laid at their wharves" (Acts 1836, Chap. 259, Sect. 2). It is possible that shares in a land company would have been held at that time in Massachusetts to be real estate; and it is noteworthy that the stockholders of this Wharf Company are not called stockholders in this charter act, but "proprietors." So, by Section 3 of the Charter "the said corporate "*property*" shall be divided into twelve thousand shares of five hundred dollars each," and in the Act of 1838, the corporate "*property*" [not the stock] is reduced. They are not, by Section 5 of the Charter Act, to "obstruct or encroach upon the channel or in any way to infringe or interfere with the rights of the Commonwealth in any flats in the harbor of Boston." By the Act of 1837 they are authorized to buy additional land, with the same proviso as to the rights of the Commonwealth in flats in the harbor. By the Act of 1854, "The Boston Wharf Company is hereby authorized to extend and maintain its wharf in that part of Boston called South Boston to the Commissioners' line . . . and shall have the right to lay vessels at the end and

sides of said wharf and receive wharfage and dockage therefor. . . . Provided also that the said wharf shall be bounded on Fort Point Channel." By Section 2 of said Act, "the Boston Wharf Company in making the extension and improvements authorized by this Act shall conform to any plan which may be adopted by the Commissioners appointed under the authority of the present Legislature for the improvement of the South Boston flats on the east side of Fort Point Channel." By Section 3 of the same Act, "The City of Boston shall have the right to lay out such streets with sewers under the same as public convenience and necessity may require on the territory over which the Boston Wharf Company is hereby authorized to construct their wharf." And by Section 5, "The Boston Wharf Company shall pay their proportion of the expenses of making the excavations set forth in the fifth section of the two hundred and fifty-fourth chapter of the Acts of eighteen hundred and fifty, such proportion to be assessed by the Commissioner appointed under said Act."

There are naturally few decisions on the power of the Federal Government to tax instrumentalities of a State, for the reason that it has hardly been attempted except in the case of State salaries, State bonds, and the internal revenue tax upon the agents of the South Carolina Dispensary. It is submitted, however, that the long list of cases deciding the converse proposition that the States may not tax instrumentalities or powers of the Federal Government, with their reasoning, is in point; also, cases upon the power, or exclusive power, of the State or the Federal Government to control business or property in their respective spheres — as, for instance, the interference of States with interstate commerce, or the control by the Federal Government in the proper cases of wharves, bridges, and ferries. The power to tax and the power to control are not, of course, commensurate; but the recognition of power to control will in proper cases have a bearing on the question whether it is a necessary State or Federal "instrumentality."

California v. *Pac. Ry. Co.*, 127 U.S. 1.
Tel. Co. v. *Texas*, 105 U.S. 460.
Guy v. *Baltimore*, 100 U.S. 434.

Gloucester Co. v. *Pa.*, 114 U.S. 196.
Ratterman v. *Tel. Co.*, 127 U.S. 411.
St. Louis v. *Ferry Co.*, 11 Wall. 423.
S. S. Co. v. *Portwardens*, 6 Wall. 31.
Henderson v. *Mayor of N. Y.*, 92 U.S. 259.
Am. Express Co. v. *Iowa*, 196 U.S. 133.
Ry. v. *Pa.*, 15 Wall. 300.

That the Act in question imposes the tax also on United States corporations does not save it. Neither sovereignty can impose a naked tax upon corporate franchises granted by the other.

The power to impose the tax in question is "exercised for ends inconsistent with the limited grants of power in the Constitution" within the meaning of these words by Chief Justice Chase in

Veazie Bank v. *Fenno*, 8 Wall. 541.

See also

Lane Co. v. *Oregon*, 7 Wall. 71, 76.

Even Chief Justice Chase's opinion in the Veazie Bank case does not decide that Congress may impose a tax on a State corporation franchise, although "not conferred for the purpose of giving effect to some reserved power of a State."

Veazie Bank v. *Fenno*, 8 Wall. 547.

In

South Carolina v. *United States*, 199 U.S. 437,

the tax was only imposed on the agents of a State so far as they were engaged in a business constitutionally taxable and always an important branch of the Federal revenue.

"The creation of a corporation, it is said, appertains to sovereignty. This is admitted."

Marshall, C. J., in McCulloch v. *State of Maryland*, 4 Wheat. 410.

III.

If not an excise tax or a tax upon a corporate franchise, it must be a property tax, a direct tax imposed in part at least, upon the income derived from real and personal property, and as such invalid,

Pollock v. *Farmers Loan & Trust Co.*, 157 U.S. 429; S.C. 158 U.S. 601.

The Spanish War tax, as has been said, was but a tax on business earnings.

Spreckels Co. v. *McClain*, *supra*, discussed above in I.,

while the case of *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, cited in *Springer* v. *U.S.*, 102 U.S. 586,

which itself was reversed by the Pollock case, discussed the same law (Act of June 30, 1864, 13 Stat. at Large, Sects. 105, 120), and rests on the reasoning of the Springer case. And that a direct income tax imposed upon a corporation would be equally invalid with one imposed upon a natural person, and this tax be furthermore invalid even if an income tax, for the reason that it is not imposed on natural persons, see cases cited under I.

It appears from the Record that the income of the Boston Wharf Company is entirely derived from real estate in the shape of rents or mortgage interest and that its capital is wholly invested in real estate. Therefore, this is peculiarly a case of a direct tax within the decision of the Pollock case. A corporation chartered to invest solely in real estate, and that a public utility and authorized to acquire income only by the use or sale of such real estate, if subject to this Act, is directly taxed and its " Proprietors " are directly taxed.

IV.

Is there any possibility that there be a *tertium quid* — that this tax be neither an excise tax on business under State charters nor a direct property tax, but an excise on a "commodity" either natural or existing under State statutes, such as was sustained in

Knowlton v. *Moore*, 178 U.S. 41?

For, while States can tax any commodity not an agency or function of the Federal Government, so the Federal Government may tax any "commodity" — short only of a necessary attribute of sovereignty, such as is the granting of corporate charters, either for the development of the business industry and prosperity of the State itself, its cities and towns, harbors and highways, or for ordinary business purposes.

The arbitrary taxes imposed in England in the past can be no guide to us, for they have no constitution protecting the citizen against an Act of Parliament, although invading cardinal rights, despite the judgment of Coke to the contrary. But even their Parliament has never imposed a tax upon mere divisibility.

See

Cobbett's Parliamentary History of England,

covering the years from 1066 to 1803, where the system of taxation is fully described at the end of each reign. Window taxes, taxes on carriages, or on the number of servants employed, and a thousand others, have been imposed; but never one upon the mere division of property into parts, as, for instance, on tenants in coparcenary, or joint owners not dividing their interests under a corporate franchise. So in the United States, while important instances of Federal taxation on commodities or rights may be found, —

Scholey v. *Rew*, 23 Wall. 331;
Nicol v. *Ames*, 173 U.S. 509;
Knowlton v. *Moore*, *supra*;
Patten v. *Brady*, 184 U.S. 608, —

there has hitherto been none on the mere possibility of dividing or the actual division of property, except, of course, upon the deeds or conveyances making such division. In Massachusetts there has existed legislation since the seventeenth century recognizing unincorporated proprietors of fields or wharves held in common, but no taxation has ever been imposed on such divisibility, although the creature of statute, other than the direct tax on the land itself. Thus, in 1698 we find an Act recognizing and authorizing the discontinuance of general fields,

Mass. Statutes, 1698, Chap. 12, Sect. 5;

in 1712, an Act authorizing such proprietors of "lands, wharves, or other real estate" to incorporate,

Mass. Statutes, 1712–1713, Chap. 9;

in 1785, an Act authorizing the proprietors of general fields to manage them and assess the proprietors *without* incorporation,

Mass. Statutes, 1785, Chap. 53,

but never an act taxing such right to hold them as proprietors in common.

So under the Federal Constitution, it is submitted that where property or business is non-taxable either by State or Nation, the mere division of such business or property into shares may not be taxed. There has never in England or America been a tax upon shares owned in ships, independent of the tax on the ship as a whole. If a whole apple is not taxable, the owners of the apple when halved are not for that reason taxable under due process of law.

Finally, that this is not intended for such a tax appears from the fact that insurance companies, though not having a capital stock represented by shares, are included.

V.

As to the inquisitorial provisions of this Act, whether or not they be unconstitutional as to corporations under the Fourth Amendment, they certainly remain unequal and discriminatory under the Fifth Amendment.

It is admitted that all reasonable inquisitory methods may be instituted in order to determine the assessment of a tax constitutionally imposed,

Hale v. *Henkel*, 201 U. S. 43,

but it is not only questionable, but was admitted in the debates in Congress that the requirements of this Act go far beyond such necessary inquisition.

And conceding the correctness of Mr. Justice Harlan's dissenting opinion in *Hale* v. *Henkel*, it may yet be urged that its reasoning applies only to a corporation under investigation by the sovereignty which created it. Inquisitions by other sovereignties, even for lawful purposes of revenue, must be judged by the ordinary constitutional law applicable to individuals. That is, the Federal Government in ordering this inquisition is not, as in *Hale* v. *Henkel*, conducting an investigation into the affairs of a corporation which it created, or which, by reason of the interstate commerce clause of the Constitution, is subject to its jurisdiction and control.

VI.

If the Congress have any power under the Constitution to tax the earnings and profits of State corporations and not of individuals, it is only under the Interstate Commerce law of the Constitution. Incomes or profits derived from interstate commerce by persons and corporations, or either, may, perhaps, be taxed by the Congress, — not as a direct tax, but as a prerequisite to doing such business.

This legislation, Section 38 of the Act of August 5, 1909, with the prior legislation creating the Federal Bureau of Corpo-

rations, was apparently based upon the Report to Congress of the United States Industrial Commission of 1902. All the reasons given for such legislation in the debates in Congress are there anticipated, but that report, while it recommended Federal taxation of corporations engaged in interstate commerce, carefully limited it to such.

> *Final Report, U.S. Industrial Commission*, Vol. XIX., pp. 647, 648, 649, 650, 651, 687, 691, 696, 708, 710, 715, 719, 720.

"The privilege or facility offered to a corporation to engage in interstate commerce is of two kinds: First, the privilege to be a corporation, which is derived from the State and cannot be taxed by the Federal Government, and second, the privilege to engage in interstate commerce, which is beyond the control of the States and within the control of Congress, and may therefore be taxed by the power that confers or permits it."

> *Ernest W. Huffcut on Constitutional Aspects of Federal Control of Corporations, ibid.*, p. 721.

VII.

That the provisions of this Section 38 originated in the Senate and were added to a complete bill originating in the House, appears from the House and Senate Journal.

> *H.R. (1909), No. 1438, and Conference Report, Journal of Senate (1909)*, p. 175.

It was avowedly not primarily a revenue measure, but one aimed at Federal control of corporations, and is not *in pari materia* with the rest of the House bill.

> *Message of the President, June 16, 1909, in Journal of Senate*, pp. 109, 110.

While conceding that in ordinary cases it may be impossible to investigate the history of a measure finally duly enacted into

law, there must yet be some limit to the ability of the two Houses of Congress to disregard this principle. In England it may be admitted that a violation of the Constitution in this particular can only be resented by that House whose prerogatives are infringed; as, for instance, the House of Commons in the case of the present Budget. But under our written Constitution, not only a measure contrary to its principles, but one enacted in a manner contrary to its provisions, is absolutely void. The lower House may not violate Article I., Section 7, of the Constitution by the mere act of ratification of the unconstitutional action of the Senate.

The Constitution provides (Art. 1, Sect. 5, Cl. 3) that "Each House shall keep a Journal of its proceedings. . . ." It has been held that a statute is not even *prima facie* valid when other records of which the Court must equally take notice (*i.e.*, Journals of House and Senate) show that some constitutional formality is wanting.

Cooley, J., in *People* v. *Mahaney*, 13 Mich. 481.

And in general it has been held in many States that for the purposes of ascertaining whether an act has been passed according to the forms required by the Constitution the Courts take judicial notice of records as contained in legislative journals.

State v. *Smith*, 44 Ohio St. 348.
People v. *Rice*, 64 Mich. 385.

VIII.

Constitutional authority for this section of the Act in question must be affirmatively expressed among the powers given to it by the Constitution or be necessary or proper therefor. If not so given — particularly if negatived in divers clauses of the Constitution itself — they are reserved to the States by the Tenth Amendment.

Kansas v. *Colorado*, 206 U.S. 46.

And there is a larger question than the mere revenue question here involved. Avowedly this tax is imposed for the purpose of bringing all corporations, and that immense preponderance of business, manufacturing, mining, commercial or trading now carried on by State corporations, under the supervision, control, and taxing power of the Federal Government. This high Court will consider the Act of Congress in its true intent and with full regard to its ultimate consequences, and in judging it will apply the Constitution in its broadest spirit and meaning. The people in establishing it meant to keep their ordinary property rights and domestic affairs free from control by the central Government. That question, not merely political but in the highest sense constitutional, is legitimate subject for argument.

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."

Marshall, C. J., in McCulloch v. *State of Maryland*, 4 Wheat. 403.

JOHN G. JOHNSON. FREDERIC JESUP STIMSON.

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Of Counsel.

FLINT *v.* STONE TRACY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT.

VAN DERHOEFF *v.* CONEY ISLAND AND BROOKLYN RAILROAD COMPANY.

HINE *v.* HOME LIFE INSURANCE COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SMITH *v.* NORTHERN TRUST COMPANY.

MINER *v.* CORN EXCHANGE NATIONAL BANK.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

CEDAR STREET COMPANY *v.* PARK REALTY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

JARED *v.* AMERICAN MULTIGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

GAY *v.* BALTIC MINING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRUNDAGE *v.* BROADWAY REALTY COMPANY.

LACROIX *v.* MOTOR TAXIMETER CAB COMPANY.

LYMAN *v.* INTERBOROUGH RAPID TRANSIT COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PHILLIPS *v.* FIFTY ASSOCIATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MITCHELL *v.* CLARK IRON COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FLUHRER *v.* NEW YORK LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

COOK *v.* BOSTON WHARF COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 407, 409, 410, 411, 412, 415, 420, 425, 431, 432, 442, 443, 446, 456, 457. Argued March 17, 18, 1910; restored to docket for reargument May 31, 1910; reargued January 17, 18, 19, 1911.—Decided March 13, 1911.

The Corporation Tax, as imposed by Congress in the Tariff Act of 1909, is not a direct tax but an excise; it does not fall within the apportionment clause of the Constitution, but is within, and complies with, the provision for uniformity throughout the United States; it is an excise on the privilege of doing business in a corporate capacity

and as such is within the power of Congress to impose; franchises of corporations are not governmental agencies of the State and the tax is not invalid as an attempt to tax state governmental instrumentalities; not being direct taxation, but an excise, the tax is properly measured by the entire income of the parties subject to it notwithstanding a part of such income may be derived from non-taxable property; the tax does not take property without due process of law nor is it arbitrarily unequal in its operation either by differences in corporations or by reason of the classes exempted; the method of its enforcement is within the power of Congress and all corporations not specially exempted by the act itself, carrying on any business, are subject to the provisions of the law.

The substitution of a tax on incomes of corporations for a tax on inheritance in a bill for raising revenue is an amendment germane to the subject-matter and not beyond the power of the Senate to propose under § 7, Art. I, of the Constitution, providing that such bills shall originate in the House of Representatives but that the Senate may propose or concur in amendments as in other bills. The corporation tax provision of the Tariff Act of 1909 is not unconstitutional as being a revenue measure not originating in the House of Representatives under § 7, Art. I, of the Constitution; but so held without holding that the journals of the House or Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of both branches of Congress, approved by the President and deposited with the State Department.

A tax, such as the Corporation Tax imposed by the Tariff Act of 1909, on corporations, joint stock companies, associations organized for profit and having a capital stock represented by shares, and insurance companies, and measured by the income thereof, is not a tax on franchises of those paying it, but a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organization of the character described in the act.

Joint stock companies and associations share many benefits of corporate organization and are properly classified with corporations in a tax measure such as the Corporation Tax. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

While the legislature cannot by a declaration change the real nature of a tax it imposes, its declaration is entitled to weight in construing the statute and determining what the actual nature of the tax is.

The Corporation Tax is not a direct tax within the enumeration provision of the Constitution, but is an impost or excise which Congress

has power to impose under Art. I, § 8, cl. 1, of the Constitution. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, distinguished.

Indirect taxation includes a tax on business done in a corporate capacity; the difference between it and direct taxation imposed on property because of its ownership is substantial and not merely nominal.

Excises are taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges; the requirement to pay such taxes involves the exercise of the privilege and if business is not done in the manner described no tax is payable.

The only limitations on the power of Congress to levy excise taxes are that they must be for the public welfare and must be uniform throughout the United States; they do not have to be apportioned.

Courts may not add any limitations on the power of Congress to impose excise taxes to that of uniformity, which was deemed sufficient by those who framed and adopted the Constitution.

The revenues of the United States must be obtained from the same territory, and the same people, and its excise taxes collected from the same activities, as are also reached by the States to support their local governments; and this fact must be considered in determining whether there are any implied limitations on the Federal power to tax because of the sovereignty of the States over matters within their exclusive jurisdiction.

Enactments of Congress levying taxes are, as are other laws of the Federal Government acting within constitutional authority, the supreme law of the land.

Business activities such as those enumerated in the Corporation Tax Law are not beyond the excise taxing power of Congress because executed under franchises created by the States.

The power of Congress to raise revenue is essential to national existence and cannot be impaired or limited by individuals incorporating and acting under state authority. The mere fact that business is transacted pursuant to state authority creating private corporations does not exempt it from the power of Congress to levy excise laws upon the privilege of so doing.

The exemption from Federal taxation of the means and instrumentalities employed in carrying on the governmental operations of the States does not extend to state agencies and instrumentalities used for carrying on business of a private character. *South Carolina* v. *United States*, 199 U. S. 437.

e constitutional limitation of uniformity in excise taxes does not equire equal application of the tax to all coming within its operaion, but is limited to geographical uniformity throughout the Jnited States. *Knowlton* v. *Moore*, 178 U. S. 41.

en if the principles of the equal protection provision of the Fourteenth Amendment were applicable there is no such arbitrary and unreasonable classification of business activities enumerated in and subject to the Corporation Tax Law as would render that law invalid. There is a sufficiently substantial difference between business as carried on in the manner specified in the act and as carried on by partnerships and individuals to justify the classification.

here are distinct advantages in carrying on business in the manner specified in the Corporation Tax Law over carrying it on by partnerships or individuals, and it is this privilege which is the subject of the tax and not the mere buying, selling or handling of goods.

hile a direct tax may be void if it reaches non-taxable property, the measure of an excise tax on privilege may be the income from all property, although part of it may be from that which is non-taxable; and the Corporation Tax is not invalid because it is levied on total income including that derived from municipal bonds and other non-taxable property.

he measurement of the Corporation Tax by net income is not beyond the power of Congress as arbitrary and baseless. Selection of the measure and objects of taxation devolve upon Congress and not on the courts; it is not the function of the latter to inquire into the reasonableness of the excise either as to amount or property on which it is to be imposed.

ongress has power to impose the Corporation Tax and the act is not void as lacking in due process of law under the Fifth Amendment.

lthough the power to tax is the power to destroy, *McCulloch* v. *Maryland*, 4 Wheat. 316, the courts cannot prevent its lawful exercise because of the fear that it may lead to disastrous results. The remedy is with the people by the election of their representatives.

usiness is a comprehensive term and embraces everything about which a person can be employed; and corporations engaged in such activities as leasing and managing property, collecting rents, making investments for profit and leasing taxicabs, are engaged in business within the meaning of the Corporation Tax Law.

is no part of the essential governmental function of a State to provide means of transportation and to supply artificial light, water and the like; and although the people of the State may derive a benefit therefrom, the public service companies carrying on such enterprises

are private, and are subject to legitimate Federal taxation, such as the Corporation Tax the same as other corporations are.

Congress has the right to select the objects of excise taxation, and this includes the right to make exemptions; exceptions in the Corporation Tax Law of labor, agricultural, religious and certain other organizations, do not invalidate the tax or render the law unconstitutional.

Courts cannot substitute their judgment for that of the legislature; where details as to estimating the amount of an excise tax, such as the deductions for interest on bonded and other indebtedness provided by the Corporation Tax Law, are not purely arbitrary, they do not invalidate the tax.

If an excise tax operates equally on the subject-matter wherever found its geographical uniformity is not affected by the fact that it may produce unequal results in different parts of the Union.

Corporations, acting as trustees or guardians under the authority of laws of a State and compensated by the interests served and not by the State, are not agents of the state government in a sense that exempts them from the operations of Federal taxation.

If it is within the power of Congress to impose the tax, it is also within its power to enact effectual means to collect the tax. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

The unreasonable search and seizure provision of the Fourth Amendment does not prevent the Federal Government from requiring ordinary and reasonable tax returns such as those required by the Corporation Tax Law.

This court will not pass on questions of constitutionality of a statute until they arise, and no question is now presented as to whether the provisions of the Corporation Tax Law offend the self-incrimination provisions of the Fifth Amendment or whether the penalties for non-compliance are so high as to violate the Constitution; the penalty provisions of the act are separable and their constitutionality can be determined if a proper case arises.

No case is presented on this record involving the question of lack of power to tax foreign corporations doing local business in a State, or whether, if the tax on foreign corporation is unconstitutional, it would invalidate the tax on domestic corporations as working an inequality against the latter; nor is any case presented involving the invalidity of the act as a tax on exports.

THE facts, which involve the constitutional validity of the Corporation Tax Law, being section 38, of the

Payne-Aldrich Tariff Act of August 5, 1909, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. Henry S. Wardner* and *Mr. John G. Sargent*, Attorney General of the State of Vermont, were on the brief, for appellant in No. 407:

The Corporation Tax Law, so far as it affects the defendant corporation, is unconstitutional because it invades the sovereignty of the States.

The tax and the other burdens of the Corporation Tax Law fall upon the corporate franchise of the defendant corporation. See President's message, June 16, 1909, declaring that it is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock. 44 Cong. Rec. 3344; and speech of Senator Newlands, *Id.* 3757, and the several amendments and speeches thereon, *Id.* 3836, 3935, 4024.

Senator Root placed the corporation tax on the same plane as the tax on the privilege of dealing on boards of exchange, citing *Nicol* v. *Ames*, 173 U. S. 509; 44 Cong. Rec. 4005, but see pp. 4025, 4029. The leading lawyers of both parties in the Senate admitted that the tax was understood to be a tax on the privilege or franchise of acting in a corporate capacity.

No opportunity for a hearing was given to the corporations by any committee of the Senate or House of Representatives and no novel revenue measure ever passed through Congress with less scrutiny of its constitutionality. See *Veazie Bank* v. *Fenno*, 8 Wall. 533, 44 Cong. Rec. 4032, 4036; *Id.* 3977, 3978.

Individuals or copartnerships, though carrying on the same character of business, being exempt, corporations are taxed not on account of the character of their business but on account of their being corporations.

As to what constitutes a corporate franchise see *Home*

Insurance Co. v. *New York*, 134 U. S. 594, 599; *Hall* v. *Sullivan Railroad Co.*, 11 Fed. Cas. 257; *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 312.

This law, therefore, is a burden upon the right to be a corporation. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, dissent of Fuller, Ch. J., p. 581; and of Brown, J., p. 691.

Until 1870 no Federal tax had been checked by this court on the ground that it invaded the sovereignty of a State; but long before that it did declare that a state tax had invaded the sovereignty of the United States. In *McCulloch* v. *Maryland*, 4 Wheat. 316, this court held that an instrumentality of government could not be taxed in respect to its operation by one of the States. See also *Osborn* v. *United States Bank*, 9 Wheat. 738, 859.

A state tax so far as it invades the constitutional powers and sovereignty of the United States is void and a Federal tax so far as it invades the reserved powers and sovereignty of the States is equally void. *Weston* v. *Charleston*, 2 Pet. 449; *Bank of Commerce* v. *New York City*, 2 Black, 620; *Dobbins* v. *Erie County*, 16 Pet. 435.

As to impropriety of taxation of state instrumentalities, see expressions of this court in *Worcester* v. *Georgia*, 6 Pet. 515, 570; *Ableman* v. *Booth*, 21 How. 506; *License Tax Cases*, 5 Wall. 462, 470; *Pervear* v. *The Commonwealth*, 5 Wall. 475; *Collector* v. *Day*, 11 Wall. 113, affirming 3 Cliff. 376; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30; *United States* v. *Railroad Co.*, 17 Wall. 322, 327.

As to exemption of municipal bonds from Federal taxation, see *Mercantile Bank* v. *New York*, 121 U. S. 138, 162; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 583, 601–652; *Plummer* v. *Coler*, 178 U. S. 115. For other cases preventing invasion of sovereignty through taxation, see *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Ambrosini* v. *United States*, 187 U. S. 1; *Bettman* v. *Warwick*, 108 Fed. Rep. 46.

States cannot tax United States patents. *Patterson* v. *Kentucky*, 97 U. S. 501; *Webber* v. *Virginia*, 103 U. S. 344; *Allen* v. *Riley*, 203 U. S. 347; *Re Sheffield*, 64 Fed. Rep. 833; *Commonwealth* v. *Westinghouse Mfg. Co.*, 151 Pa. St. 265; *Edison Co.* v. *Board of Assessors*, 156 N. Y. 417.

A patent is a franchise. *Bloomer* v. *McQuewan*, 14 How. 539, 549; *Seymour* v. *Osborne*, 11 Wall. 516; *Patterson* v. *Kentucky*, 97 U. S. 501, 506. A State cannot tax a Federal corporate franchise. *California* v. *Cent. Pac. R. R. Co.*, 127 U. S. 1; *Cent. Pac. R. R. Co.* v. *California*, 162 U. S. 91.

Taxation of a state corporate franchise is beyond the power of Congress. The granting of charters and franchises to corporations is a prerogative of the crown; as such, it is owned by the States. *Wheeler* v. *Smith*, 9 How. 55, 78. In *Veazie Bank* v. *Fenno*, 8 Wall. 533, the tax was not on the franchise; the statute there under discussion may be sustained on the strength of the Government's power to regulate currency. See *Head Money Cases*, 112 U. S. 580.

If § 122 of the Internal Revenue Act of 1864, as amended in 1866, affords a precedent for the corporation tax of 1909, *Railroad Co.* v. *Collector*, 100 U. S. 595, does not sustain the corporation tax nor does *United States* v. *Railroad Co.*, 17 Wall. 322; or *Nicol* v. *Ames*, 173 U. S. 509.

The transmission of property on the occasion of the owner's death, being an inevitable occurrence, can be taxed to any extent by the United States without preventing the transmission. On the other hand, corporate franchises are government creations; they may easily be taxed to extinction, and the granting of franchises may easily be prevented by the mere enactment of a tax statute.

There is a clear distinction between a Federal tax on the doing of a thing with or in respect to property which the State did not create, and a Federal tax on a corporate

franchise created and granted out of state sovereignty. *Thomas* v. *United States*, 192 U. S. 363; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, do not support the constitutionality of the corporation tax. The latter case sustained § 27 of the War Revenue Act as an excise tax on a particular business and was in line with *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433. The Corporation Tax Law mentions no particular business except insurance. *South Carolina* v. *United States*, 199 U. S. 437, does not apply. The tax was laid on the dispensaries not because they were empowered by the State, but because they dealt in liquors. The Corporation Tax Law falls upon corporations because they are empowered by the State and not because they do a general business.

Until the enactment of the Corporation Tax Law no such tax had been imposed by Congress. In 122 years of legislation under the Constitution the corporation tax of 1909 is the first of its kind. *Hale* v. *Henkel*, 201 U. S. 43, 86.

The burdens of the Corporation Tax Law fall on the franchise of every corporation. The law therefore puts the burden on the power of the States to create corporations, and mere phraseology counts for little as against the substance and effect when the constitutionality of the law is attacked. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 580; *Knowlton* v. *Moore*, 178 U. S. 41, 81; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 411.

The plain language of the Tenth Amendment to the Constitution is not to be evaded by a device which clothes an invasion of state sovereignty in a new name.

Among the "ordinary functions" of state government is the creation of corporations, and the exercise of a prerogative of sovereignty in creating them is strictly governmental. The invasion of state sovereignty through the corporation tax is actual and real.

The operation of the law would result in confiscation

instead of taxation. "For taking away our charters" was one of the grievances of the American colonies against the King of Great Britain.

The corporations are deprived of their property without due process of law.

No justification for this tax is to be derived from any analogy to state corporation taxes. The relation of the States to corporations is different from the relation of the Federal Government to state corporations. A State grants a corporate charter, and it may impose on that charter such conditions, whether in the form of taxes or otherwise, as it sees fit.

Congress, in classifying corporations as the objects of a special corporation tax, assumes that apart from the reasons why a State may so classify them, there is some other basis for classification. There is none, however, and every feature of business peculiar to corporations is an incident inherent in the franchise granted and exempt from Federal taxation. *Kansas Pac. R. R. Co.* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 112 U. S. 414; *McKinley* v. *Wheeler*, 130 U. S. 630.

For Congress to classify corporations as the objects of a special and discriminating tax, whether the burdens are light, oppressive or wholly confiscatory, is utterly arbitrary. *San Bernardino County* v. *Southern Pac. R. R. Co.*, 118 U. S. 417.

Due process of law is a process which accords with those immutable principles of justice which inhere in the very idea of free government. *Holden* v. *Hardy*, 169 U. S. 366, 389; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Columbia Bank* v. *Okely*, 4 Wheat. 235, 244; *Twining* v. *New Jersey*, 211 U. S. 78, 101.

Congress must conform to these principles in the passage of every law. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272; *Sinking Fund Cases*, 99 U. S. 700, 718.

The arbitrary action of Congress in placing these unprecedented and oppressive burdens on the defendant corporations and wholly exempting their business competitor from every one of them is not due process of law. *Ballard* v. *Hunter*, 204 U. S. 241; *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Duncan* v. *Missouri*, 152 U. S. 377; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150.

It is of no importance that the Fifth Amendment to the Constitution contains no specific clause as to the equal protection of the laws. Congress cannot from such omission claim the right to enact laws which are unjust, unequal, oppressive and arbitrary.

The Fourteenth Amendment is but declaratory of the law as it had long existed. See Historical Remarks on Taxation of Free States, 1778, p. 39; *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 241; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The corporation tax declares a discrimination "clear and hostile" upon companies which owe the General Government no allegiance and no debt for their creation. It is a discrimination "unusual" to the extent of being without a precedent in the history of the country and is therefore wholly "unknown." It does not proceed within reasonable limits for in the reason of things there is no basis for the discrimination; and as for being within "general usage," the fact that it was hitherto unknown condemns it upon that ground. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92; *Billings* v. *Illinois*, 188 U. S. 97, 101; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

The act is unconstitutional because it takes property for public use without just compensation, not only as to the one per cent tax, but also as to the peculiar requirement of subd. 6 of the law, which says that the returns "shall constitute public records and be open to inspection as such."

This publicity is not required for the purpose of imposing the tax. It can in no way enhance the public revenues. It is arbitrary, visitatorial and disciplinary in its nature. It is not, in any sense, for revenue purposes. A corporation is protected under the Fifth Amendment against the taking of its property without just compensation. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Hale* v. *Henkel*, 201 U. S. 43, 76.

The corporation tax is a direct tax on the franchise and therefore unconstitutional because not apportioned. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429; *S. C.*, 158 U. S. 601; *Nicol* v. *Ames*, 173 U. S. 509, 520; *California* v. *Cent. Pac. R. R. Co.*, 127 U. S. 1, 41. It is in the nature of a poll tax. Beale on Foreign Corp., § 508, p. 665; *Lumberville Delaware Bridge Co.* v. *Assessors*, 55 N. J. Law, 529, 537.

Any tax when placed on the right of the man or of the corporation to live is a capitation tax and as direct as any tax can be.

The inclusion of joint stock companies within the terms of the statute does not affect the argument on the previous points. *Liverpool* v. *Massachusetts*, 10 Wall. 566; *Attorney General* v. *Mercantile Marine Ins. Co.*, 121 Massachusetts, 524; *Platt* v. *Wemple*, 117 N. Y. 136.

Mr. Richard V. Lindabury, with whom *Mr Charles W. Pierson* and *Mr. Robert Lynn Cox* were on the brief, for appellants in Nos. 409 and 410:

The tax is not an excise tax upon business or occupation, but is either a corporate franchise tax, or an income tax; it is imposed only on artificial persons; it is measured by a percentage of net income, not from business carried on, but from all sources. No kind or kinds of business are specified but the tax extends to income from business of exporting, and to income from business done outside the jurisdiction. The nature of the tax does not depend on what Congress has seen fit to label it.

If the tax be construed as a franchise tax, it constitutes, so far as state corporations are concerned, an interference with sovereign powers and functions of the States not surrendered to the General Government and expressly reserved to the States by the Tenth Amendment.

The fact that the tax is laid on joint stock companies as well as on corporations does not necessarily indicate that it is not a franchise tax.

The right to grant corporate charters for ordinary business purposes is an attribute of sovereignty belonging to the States, not to the General Government. As to implied limitations on Federal power of taxation, see *California* v. *Cent. Pac. R. R. Co.*, 127 U. S. 1.

The true test is found in the nature of the function performed by the State in chartering the corporation, not in the nature of the function performed by the corporation after it is chartered; as to this see taxation of patent rights and copyrights; as to the general limitations of taxing power, see *Railroad Co.* v. *Collector*, 100 U. S. 595; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Knowlton* v. *Moore*, 178 U. S. 41. *South Carolina* v. *United States*, 199 U. S. 437, discussed and distinguished.

The tax is an attempted encroachment by Congress on a new field; it cannot be sustained as a tax on franchises as property. The claim of a right in Congress to tax franchises of state corporations is dangerous and the practical consequences if such a claim be upheld will be serious.

If the tax be construed as an income tax it is unconstitutional because imposed upon income from real estate and personal property, and therefore a direct tax not apportioned among the States according to population; also because imposed upon income from state and municipal securities and therefore a burden on the borrowing power of the States. As these are essential and inseparable parts of the taxing scheme, the tax must fall as a whole.

The tax is non-uniform, arbitrary and unequal, and if imposed and enforced would deprive the corporations and joint stock associations against which it is levied of their property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution.

The classification is arbitrary because limited to artificial persons; and because some corporations such as fraternal benefit societies and domestic building and loan associations are exempted.

The apportionment is arbitrary because the tax is not limited to income from business done; and as between corporations whose indebtedness does and does not exceed amount of their paid capital stock; also as between domestic corporations doing business abroad and foreign corporations.

Whatever view may be taken of the act in its other aspects, it must be held unconstitutional, so far as it imposes a tax on the franchises or business of state railroads or other public service corporations, because an interference with state agencies or instrumentalities.

The fact that insurance companies are specifically mentioned does not differentiate them from the other corporations subject to the tax.

Mr. John G. Johnson and *Mr. Frederic Jesup Stimson*, with whom *Mr. Lawrence M. Stockton* and *Mr. Harris Livermore* were on the brief, for appellants in Nos. 425 and 457:

It was not within the power of the States before the Fourteenth Amendment to deprive citizens of the equal protection of the laws. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 155.

The words "due process of law" in the Fifth Amendment have therefore the full meaning and intention more amply expressed in the Fourteenth Amendment by the addition of the words "equal protection of the laws."

For comparison of these phrases, see Stimson's Fed. and State Const. pp. 75, 80, 90; Taswell-Langmead, English Const. Hist., 6th ed., quoting Coke, 104–107; 2 Hannis Taylor, Eng. Const. p 3.

Words in the Federal Constitution are to be construed and extended according to their full historical meaning acquired at the time of its adoption. Cooley, Const. Law, 4th ed., p. 387; *Mattox* v. *United States*, 156 U. S. 237; *Kepner* v. *United States*, 195 U. S. 100.

Unequal taxation, not based upon a reasonable classification, is not "due process of law," and an excise tax imposed on the doing of business (save where imposed as a charter limitation by the sovereignty creating a corporation), like a simple property tax must apply alike to all persons and all corporations engaged in the same business. A franchise tax may be imposed in lieu of or in addition to a simple property tax, but where the tax is not imposed upon the charter to do business as a corporation as such, it must apply equally to corporations and individuals.

Mr. Richard Reid Rogers for appellants in No. 442:

The act of Congress is unconstitutional with especial respect to the Interborough Rapid Transit Company, inasmuch as it imposes a tax upon a public agency engaged in carrying on a municipal, and therefore, under the decisions of this court, a state enterprise.

A railroad chartered by the Congress of the United States, employed to transport the mails of the United States, or its troops and munitions of war, and engaged in conducting broadly an interstate commerce business, notwithstanding the fact that its existence is due to private initiation, and its profits are distributed to private investors, is nevertheless an agency of the Federal Government, so that its right to exist and carry on its work cannot be taxed by any state government.

A municipality is but the arm of a state government;

a municipal undertaking is a public undertaking of the State itself, and, therefore, municipal property and municipal agencies enjoy the same protection from Federal taxation as the property and agencies of the State of which the municipality is a mere subdivision. *People ex rel. Interborough R. T. Co.* v. *Tax Commissioners*, 126 App. Div. 610.

The public agencies of a State, or of a municipality of a State, may not be taxed by the Federal Government. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 547; *The Collector* v. *Day*, 11 Wall. 113, 125; *United States* v. *Railroad Co.*, 17 Wall. 322; *United States* v. *Louisville*, 169 U. S. 249; *Mercantile Bank* v. *New York*, 121 U. S. 138; *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, 584; *Van Allen* v. *The Assessors*, 3 Wall. 573, 591; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529; *United States* v. *Stanford*, 161 U. S. 412; *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 92; *Railroad Co.* v. *Peniston*, 18 Wall. 30; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 162; *Fagan* v. *Chicago*, 84 Illinois, 227, 233, 234; *Knowlton* v. *Moore*, 178 U. S. 41, 59; *Ambrosini* v. *United States*, 187 U. S. 1, 7; *United States* v. *Railroad Co.*, 17 Wall. 322, 330; *United States* v. *Louisville*, 169 U. S. 249.

The act of Congress is unconstitutional in so far as it attempts to impose a tax upon the franchises of foreign corporations, or at least upon their right to carry on a purely intrastate business—a matter over which the Federal Government has no control. The whole act, therefore, must fail, inasmuch as it cannot be assumed that Congress intended to pass a law which would place state corporations at a disadvantage with respect to foreign corporations engaged in the same character of business. *License Tax Cases*, 5 Wall. 462, 471; *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 210.

The tax is so unequal that by definition it is not such an act as Congress has the delegated power to impose.

Mr. Julien T. Davies, with whom *Mr. Frederic D. McKenney* was on the brief, for appellant in No. 415:

The tax imposed by the Corporation Tax Law is a direct tax upon income from real estate and personal property, and not being apportioned among the several States is unconstitutional.

If the tax is not upon net income, it is a tax upon the franchise to be a corporation, and as such, void, because in conflict with the implied limitations upon the taxing power contained in the Constitution.

The Corporation Tax Law, if the tax falls upon "carrying on or doing business," must fail for want of equality and uniformity in the tax thereby imposed.

The provisions of the Corporation Tax Law with regard to the making of returns and constituting such returns public records are unconstitutional as requiring an unreasonable search.

The power of Congress to raise revenue for the support of the General Government, that is, its power of taxation, and the power of Congress to regulate commerce with foreign nations and among the several States, are both derived from the same articles of the Constitution of the United States. In their origin, they are equal and coordinate powers. The power to regulate commerce is, however, exclusive of the power to tax concurrent with the powers of the several States.

The right of all persons, as well as corporations, to engage in interstate commerce is a constitutional right and one which cannot be taken away or prohibited, although it can be regulated by Congress.

The corporation tax is unconstitutional; as to corporations engaged in interstate commerce it is clearly a tax on the doing of the business of interstate commerce, as it exceeds regulation.

To engage in interstate commerce is a constitutional right and not a privilege; therefore Congress cannot pro-

hibit the exercise of such right. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Reid* v. *Colorado*, 187 U. S. 137; *Howard* v. *Illinois Cent. R. R. Co.*, 207 U. S. 463; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Paul* v. *Virginia*, 8 Wall. 168.

There is a distinction between the power to regulate commerce between the States and the power to regulate commerce with foreign nations and with Indian tribes. *Int. Comm. Comm.* v. *Brimson*, 154 U. S. 447; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Williams*, 194 U. S. 279; *United States* v. *Ju Toy*, 198 U. S. 253; *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320.

Taxation is not included within the power of regulation granted by the Constitution. The power to tax is the power to destroy or prohibit. If interstate commerce can be taxed at all, it can be taxed out of existence and thus prohibited. *McCray* v. *United States*, 195 U. S. 27. The power to regulate does not include the power to prohibit. *Miller* v. *Jones*, 80 Alabama, 89; *Bronson* v. *Oberlin* (O.), 52 Am. Rep. 90; *Ex parte Patterson* (Tex.), 51 L. R. A. 654; *Duckall* v. *New Albany*, 25 Indiana, 283; *McConvill* v. *Jersey City*, 39 N. J. Law, 38; *People* v. *Codway*, 28 N. W. Rep. 101; *Mernaugh* v. *Orlando*, 41 Florida, 433; *In re Hanck* (Mich.), 38 N. W. Rep. 275; *State* v. *DeBar*, 58 Missouri, 395; *Sweet* v. *Wabash*, 41 Indiana, 7; *Andrews* v. *State* (Tenn.), 8 Am. Rep. 8; *Ex parte Byrd* (Ala.), 4 So. Rep. 397; *Muhlenbrinck* v. *Long Branch Comrs.*, 42 N. J. Law, 364.

Mr. Edward Osgood Brown, with whom *Mr. George Packard* and *Mr. Vincent J. Walsh* were on the brief, submitted for appellants in Nos. 411 and 412:

While as held in *Knowlton* v. *Moore*, Congress may tax even though it involves the power to destroy some business or property right of a citizen or corporation, it

has not the power to tax and thus destroy the right of existence of a corporation. Such a power would be tantamount to a power to tax the right to create such an existence. *California* v. *Central Pac. R. R. Co.*, 127 U. S. 1; *Collector* v. *Day*, 11 Wall. 113; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 178. *Knowlton* v. *Moore* and *Veazie Bank* v. *Fenno*, 8 Wall. 533, hold nothing to the contrary.

Whatever may be said of other corporations, public service corporations in private hands furnishing transportation, water, light, or performing other public or semi-public functions, are instrumentalities of the State in the strictest sense and for that reason are given the power of eminent domain; the functions of many of them are indeed governmental, *e. g.*, the functions of water companies. *Water Co.* v. *Fergus*, 180 U. S. 624; *Water Co.* v. *Freeport*, 180 U. S. 587; *Water Co.* v. *Danville City*, 180 U. S. 619.

The inclusion of these public service corporations is a part of the intent under which the law was passed as an "entire scheme of taxation," and if it fails as to them it must fail as a whole—under the holding in the *Pollock case*.

Under the allegations of our bill the Corporation Tax Law is an invalid and unenforceable enactment as against the defendant corporation in this case—The Northern Trust Company—because it is shown by those allegations that said company is in an especial manner an agency of the legislative and judicial departments of the government of Illinois, and in its case, therefore, the corporation tax is in a peculiar and especial sense an attempted unconstitutional interference with an instrumentality of the State of Illinois in the discharge of its functions and powers.

The Corporation Tax Law if invalid against the great mass of corporations intended to be affected by it, cannot be held valid as to national banks and other corporations

created by Federal authority. A tax falling only on such corporations was not within the intention of Congress. If it fails as to state-created corporations, therefore, it must fail as to national banks. *Pollock* v. *Trust Co.*, 158 U. S. 601; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Spraigue* v. *Thomson*, 118 U. S. 90; *Warren* v. *Charlestown*, 2 Gray, 84.

Mr. Charles H. Tyler, *Mr. Owen D. Young*, *Mr. Burton E. Eames* and *Mr. Randolph Frothingham* for appellant, in No. 443, submitted:

The defendant corporation is not within the statute, as it applies only to such corporations as are carrying on or doing business.

The defendant corporation is not carrying on or doing business.

The care and attention which is given by an owner to his property as incidental merely to the protection and preservation of his investment, does not constitute carrying on or doing business within the meaning of this act. *Parker Mills* v. *Commissioners of Taxes*, 23 N. Y. 242; *Re Ala. & Chat. R. R. Co.*, 9 Blatchf. 390.

The present act is to be interpreted not by giving the broadest possible interpretation to the words, "carrying on or doing business" because that would lead to results at once unreasonable and unconstitutional.

The carrying on or doing business is not to be applied to every activity of a corporation; and the courts have restricted the application of the words to the principal or primary pursuit or occupation of the company and have not extended it to matters purely incidental. See Marshall, Principles of Economics, 348 (London, 1891).

Mr. C. H. Williams for appellants in No. 457.

Mr. J. B. Foraker, with whom *Mr. Alton C. Dustin*,

Mr. D. Edward Morgan and *Mr. Richard Inglis* were on the brief, for appellant in No. 420.

Mr. Frederic R. Coudert for appellants in Nos. 431 and 432, submitted.

Mr. Jed. L. Washburn, with whom *Mr. William D. Bailey* and *Mr. Oscar Mitchell* were on the brief, for appellant in No. 446.

Mr. William D. Guthrie, with whom *Mr. Victor Morawetz* and *Mr. Howard Van Sinderen* were on the brief, for appellee in No. 410:

The argument in support of the contention of this appellee may be divided as follows for convenience of discussion:

A tax upon income derived from the carrying on or doing business is an excise and not a direct tax within the meaning of the Constitution.

Congress cannot constitutionally impose an excise tax measured by non-taxable income.

The act of August 5, 1909, should be construed as imposing an excise tax only upon income derived from the carrying on or doing business.

The act of August 5, 1909, is not severable.

A tax upon the carrying on or doing business or upon the net income derived from the carrying on or doing business is an excise and not a direct tax within the meaning of the Constitution. *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 443; *Railroad Co.* v. *Collector*, 100 U. S. 595, 598; *Springer* v. *United States*, 102 U. S. 586, 598; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 411; *South Carolina* v. *United States*, 199 U. S. 437, 454.

The constitutional provision that all excises shall be uniform throughout the United States merely requires

geographical uniformity. *Knowlton* v. *Moore*, 178 U. S. 41.

Congress may not tax United States bonds and particularly those issued under the acts of July 14, 1870, 16 Stat. 272, and January 14, 1875, 18 Stat. 296. Although the Constitution does not expressly prohibit the United States from impairing the obligation of contracts, the due process clause of the Fifth Amendment prevents any such impairment or destruction of contract rights. *Sinking Fund Cases*, 99 U. S. 700, 718; *United States* v. *Union Pacific Ry. Co.*, 160 U. S. 1, 33. Nor can such income be indirectly taxed by means of a so-called special excise tax upon the carrying on or doing of business by corporations. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429.

The constitutional provisions conferring upon Congress power to impose taxes make no distinction between corporations and individuals. Indeed, corporations are not mentioned in the Constitution. The power to tax private corporations organized under state laws is coextensive with the power to tax individuals and flows from exactly the same constitutional provisions as apply to individuals. Therefore, Congress cannot impose upon corporations, or upon companies or associations of any class, an excise tax that it cannot impose upon corporations and other companies or associations.

The mere franchise or license to be a corporation or to carry on business in corporate form certainly does not of itself make a corporation a governmental instrumentality or agency. *Railroad Co.* v. *Peniston*, 18 Wall. 5, 31; *South Carolina Case*, *supra*, 199 U. S. 437.

The classification of corporations as a separate class by the States has been sustained on grounds which are, at least partly, unavailable in support of an act of Congress. *The Delaware Railroad Tax*, 18 Wall. 206; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606; *New York* v. *Roberts*, 171

U. S. 658, 665; *Florida Central &c. R. R. Co.* v. *Reynolds*, 183 U. S. 471, 477; *Berea College* v. *Kentucky*, 211 U. S. 45, 54.

Congress, however, cannot constitutionally impose an excise tax measured by non-taxable income.

It is submitted that the underlying principle of these decisions is that a license or occupation tax cannot be imposed by a State upon foreign corporations, measured by the amount of non-taxable property or the amount of non-taxable interstate business of the corporation, and that any such attempt would establish an unconstitutional basis of classification for purposes of taxation; in other words, that a tax cannot be measured by non-taxable property or income. If we apply the same principle to the case at bar, it must follow that Congress cannot directly or indirectly measure an excise tax on corporations or individuals by property or income which is not taxable at all or only taxable by a direct and apportioned tax. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 410, 417; *Galveston, Harrisburg &c. Ry. Co.* v. *State of Texas*, 210 U. S. 217; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 416; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 519; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *State Tonnage Tax Cases*, 12 Wall. 204, 217.

The corporation tax should be construed as imposing an excise tax only upon income derived from the carrying on or doing business. If an act of Congress be reasonably susceptible of a construction that will avoid a conflict with the Constitution of the United States, such construction should be adopted. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

The act is susceptible of a construction which may render the act constitutional and avoid the grave and doubtful constitutional questions involved in the contention of the Government or suggested in the numerous

briefs filed on behalf of the various appellants. According to this construction, as the act purports to impose "a special excise with respect to the carrying on or doing business," the tax is to be assessed upon net income received "from all sources" in carrying on or doing business, but is not to be assessed upon income derived directly from United States, state, county or municipal securities, or from real and personal property not used or employed in business. Thus construed, the act imposes an excise tax upon business or occupation and not in any respect a direct tax on property or on non-taxable securities, and thereby any conflict with express or implied constitutional limitations is avoided.

Congress has acted upon the decisions of this court in the Income Tax Cases, and has proposed for adoption by the several States a Sixteenth Article of Amendment to the Constitution, to read as follows. "Article 16. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration."

The Corporation Tax Law is subject to the implied constitutional limitation that bonds issued by the Federal and state governments are not taxable directly or indirectly by Congress. *Kepner* v. *United States*, 195 U. S. 100, 125; *United States* v. *Nix*, 189 U. S. 199, 205. The test in each case should be whether the income had been received as direct income from property or as income from carrying on business. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 417.

The court will undoubtedly take judicial notice that the Sixteenth Amendment was proposed in connection with the passage of the Tariff Law of 1909. A number of senators and representatives were insisting upon inserting in that tariff law an income tax similar to the tax contained in the act of 1894, so as thereby to force a

reconsideration of the ruling in the prior cases. It was in order to prevent any general income tax provision in the act of 1909 similar to the provision contained in the act of 1894, and in order to avoid the unseemly position of the Congress declining to accept the authoritative decision of this court, that a compromise was entered into under which it was agreed to pass a joint resolution to amend the Constitution of the United States as suggested by this court in the opinion in the *Pollock Case*, 158 U. S. 635, so as to vest in Congress power to lay direct income taxes without apportionment. It would be strange, indeed, if in view of this indisputable history, it should now be held that after all it was the deliberate intention of Congress, in and by § 38 of the act of 1909, to enact a provision which, as to corporations, joint stock associations and insurance companies, should be identical in substance and effect with the income tax provision contained in the act of August 15, 1894, and thus plainly in conflict with the ruling in the Income Tax Cases of 1895.

The separate provision taxing the income of foreign corporations derived from "capital invested within the United States" is clearly unconstitutional within the ruling in the *Pollock Case*. On such capital invested in real or personal property the tax is direct and not an excise. But, so far as we have been informed, no foreign corporation is now before the court challenging the constitutionality of the act because, as to it, the tax is partly an excise tax on business transacted and partly a direct tax on capital invested.

So also as to the taxation of such corporations as are engaged in the export business or in transacting business in foreign countries. Assuming that income derived from exporting or income derived from carrying on or doing business in foreign countries is not within the taxing power of Congress under the rules declared in such cases as *Railroad Co.* v. *Jackson*, 7 Wall. 262; *State Tax on Foreign-*

Held Bonds, 15 Wall. 300; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 181; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299; *Delaware, L. &c. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 294; *Selliger* v. *Kentucky*, 213 U. S. 200; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, it may be ruled that it does not lie with those not so engaged to challenge the constitutionality of the act of Congress in so far as it affects other corporations not before the court.

The provision in the act of 1909 excluding income received as dividends upon stock of other corporations, etc., does not imply that no other deductions were intended by Congress. *People ex rel. Vandervoort Ry. Co.* v. *Glynn*, 194 N. Y. 387, 389.

Mr. James L. Quackenbush for appellees in No. 442, submitted.

Mr. Charles A. Snow and *Mr. Joseph H. Knight* for appellees in No. 425 submitted.

The Solicitor General for the United States on the reargument; *Mr. Solicitor General Bowers* on the original argument, by leave of the Court in support of the constitutionality of the Corporation Tax Law:

Appellants have presented against this tax every possible objection that could be made to any form of taxation under the Constitution.

It is said to be a tax upon exports, and void because beyond the power of Congress to lay in any manner; a direct tax and void because not apportioned among the States according to population; an excise tax and void because not uniform throughout the United States; a tax upon corporate franchises, and void as an impairment of the sovereignty of the States; a tax upon business, and

void as discriminating against corporations; not a tax at all, but a mere confiscation of private property for public use; void because in its methods of assessment and collection it involves unreasonable search and seizure and self-incrimination; and, finally, that it was not constitutionally enacted because it is a revenue measure and originated in the Senate.

The first ground of objection may be dismissed with the suggestion that none of the complainants is engaged in the business of exportation, and the last is not tenable because the bill originated in the House, and the Senate in substituting the corporation tax for another tax provided for in the original bill did no more than exercise its undoubted power of amendment.

In determining whether a tax is direct or indirect within the meaning of the Constitution, its incidence is not to be considered. The question is not an economic one, but legal, and we must look for the answer to the legislative and judicial history of the country. *Owensboro Bank* v. *Owensboro*, 173 U. S. 664; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503. .

The nature of the tax is determined by its subject-matter—that upon which it is laid.

The act itself discloses this. The tax is upon the business done by the corporations.

The remainder of the act deals with the rate of the tax, its measure, exemptions, assessment, collection, etc.

Rufus King asked in the Federal Convention, "What is the precise meaning of direct taxation?" No one then answered the question. Taxes on capitation and land were, however, certainly meant. The intention even here was to tax in some measure, according to ability to pay. So slaves were to be counted as three-fifths of their real number, and the land tax was to be according to population, because land values depended largely upon density of population.

When the carriage tax was imposed in 1794 members of the Convention expressed their view of what was direct taxation.

In the administration which proposed the tax were three members of the Convention,—Washington, Hamilton and Randolph; in the House which enacted it were Baldwin, Dayton, Fitzsimmons and Madison, and in the Senate were Ellsworth, King, Morris and Martin. Of these, only Madison opposed the tax.

In the *Hylton Case*, in which the tax was challenged, of the justices participating in the decision Wilson and Paterson were members of the Federal Convention and Iredell was a member of the North Carolina Convention which ratified the Constitution.

The decision, unanimous for the tax, was acquiesced in by the country as a proper construction of the Constitution, and later Madison himself as President approved of a like tax.

The carriage tax was certainly a tax upon property, and in a sense direct, for it must be paid by the owner of the carriage on which it fell, but because it was laid not upon property generally, and only upon a peculiar species of property, it was held to be an excise. Great stress was laid by the court upon the fact that it was incapable of just apportionment according to population, as indicating that it was not such a tax as was intended to be apportioned.

During the war of 1812 and during the Civil War taxes were levied upon different species of property, upon various occupations, and upon different business pursuits of individuals and corporations, and every such tax was laid as an excise. And these could none of them be justified as war taxes, for the taxing power of the Government is the same in war and peace.

After the war some of these taxes were assailed as unconstitutional. *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433;

Veazie Bank v. *Fenno*, 8 Wall. 533; *Scholey* v. *Rew*, 23 Wall. 331; *Railroad Co.* v. *Collector*, 100 U. S. 595; *Springer* v. *United States*, 102 U. S. 586.

In these cases were involved a tax upon dividends, a tax upon state bank notes, a succession tax, and a general income tax. They were all assailed as direct and as void because unapportioned; but they were all sustained.

Railroad Co. v. *Collector*, *supra*, is directly in point, as the tax was upon the net income of corporations. It is criticised as not having been well considered, because the amount involved was small, but it was followed in *Railroad Co.* v. *United States*, 101 U. S. 543; *Bailey* v. *Railroad Co.*, 106 U. S. 109; *United States* v. *Erie Ry. Co.*, 106 U. S. 327; *M. & C. R. R. Co.* v. *United States*, 108 U. S. 228; *Little Miami* v. *United States*, 108 U. S. 277.

In some of these cases the amounts involved were large. A decision of this court six times made upon the same question certainly expresses its deliberate judgment.

For one hundred years, from 1794 to 1894, there was entire accord between the executive, legislative and judicial departments of the Government as to what was a direct tax; and during that time a tax upon business, however measured, was always held to be not a direct tax but an excise. It is said the *Income Tax Case*, 157 U. S. 429; *S. C.*, 158 U. S. 601, has settled a different rule.

The tax there was upon income from all sources, and by a divided court was held to be direct in so far and only in so far as it fell upon income from property. That a tax upon "gains or profits from business, privileges or employments" is an excise was distinctly recognized by the majority opinion, and every previous case bearing upon the question, except that of *Springer* v. *United States*, *supra*, was distinguished and in effect approved.

The cases decided by the court since deal with the *Income Tax Case* as thus limited in its scope. *Nicol* v. *Ames*, 173 U. S. 509; *Knowlton* v. *Moore*, 178 U. S. 41;

Plummer v. *Color*, 178 U. S. 115; *Murdock* v. *Ward*, 178 U. S. 139; *United States* v. *Perkins*, 163 U. S. 625; *Snyder* v. *Bettman*, 190 U. S. 249; *Patton* v. *Brady*, 184 U. S. 608; *Thomas* v. *United States*, 192 U. S. 363; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

In these cases the taxes were upon sales of merchandise on boards of trade, measured by the value of the property, upon successions, measured by their value, upon tobacco, upon the sale of stocks, measured by the par value of the stocks, and upon business, measured by the income of the business. In each of them the contention was made that the tax was a direct tax upon property, and the *Income Tax Case* was cited to support the contention; but in every case the tax was held to be not upon the property but upon the peculiar right, privilege or facility enjoyed or used, or upon the business involved, and valid as an excise. The cases preceding the *Income Tax Case*, saving *Springer* v. *United States*, were again and again cited and approved.

Every previous decision of this court, not excepting that in the *Income Tax Case*, supports the view of the Government that this tax upon the business of corporations is not a direct tax, and so need not be apportioned.

That the tax reaches income from all sources does not change its nature, for that relates only to the measure of the tax. The subject of the tax being within the power of Congress, the measure of it is largely a matter for its discretion. *United States* v. *Singer*, 15 Wall. 111.

Besides, the property held by a corporation, whether actively employed in its principal business or not, does serve as an aid to that business, adding to its financial strength and credit. Corporations, except those purely public, and eleemosynary institutions, are organized for business purposes. The law does not recognize such a thing as a corporation being "a chartered gentleman of leisure." And it is singular that if the real estate com-

panies, which claim immunity upon the ground that they do nothing, but are simply incorporated proprietors of great business buildings, are not engaged in business, they should yet complain of the tax as discriminating against them and in favor of individual and partnership competitors. The degree of the activity of the corporation can make no difference. Doing business at all, or of any kind, the company is subject to the tax, and in every case to the same measure, that is, its entire net income determined as provided by the law.

As an excise the tax is uniform in the constitutional sense, because the same throughout the United States, and no more is required. *Knowlton* v. *Moore*, 178 U. S. 41.

The exemptions do not invalidate it. The legislature has a discretion as to these and especially where, as here, the result is to lay the tax as every tax should be—in the measure of the ability to bear it.

The tax is not upon the agencies and instrumentalities of the state governments.

Public corporations are not sought to be taxed. Corporate privileges for the conduct of business, held and used for purposes of private gain, do not clothe the possessors of them with the attributes of state sovereignty.

The Stone Tracy Co. and the firm of Tuxbury & Co., referred to in brief of appellant Flint, each conduct a general merchandise business at Windsor, Vermont.

The business in each case is private. It is no more a public function when conducted by a corporation than when conducted by a partnership. If the business of the corporation is the exercise of sovereignty it cannot be taxed even though like business conducted by individuals is taxed.

The State taxes the business and property of its private corporations and the taxing power of the Nation is as broad in scope as that of the State. *McCulloch* v. *Mary-*

land, 4 Wheat. 316; *Lane County* v. *Oregon*, 7 Wall. 71; *Railroad Co.* v. *Peniston*, 18 Wall. 5.

The power of the State to grant franchises is not impaired. For its grant the State may demand a price, either present payment in full, or periodical payments running through the life of the grant. So it may dispose of land or other property. In the price obtained for its grant the Nation may not share, but the franchise, when granted, or the property, when conveyed and held in private ownership, may be taxed by State and Nation as anything else of value, or having the attributes of property, may be. *Memphis &c. Co.* v. *Shelby Co.*, 109 U. S. 398; *Metropolitan &c. Ry. Co.* v. *New York Tax Commissioners*, 199 U. S. 1; *St. Louis* v. *United Railways Co.*, 210 U. S. 266.

The question here is not *how* a tax may be laid upon corporate franchises or corporate business but whether it may be laid at all.

The right of the Government to tax state corporations is clearly implied in *McCulloch* v. *Maryland*, *supra*, and is clearly asserted in *Veazie Bank* v. *Fenno*, *supra*. And also in *Scholey* v. *Rew*; *Railroad Co.* v. *Collector*; *Plummer* v. *Coler*, *supra*.

The doctrine of these and other cases which might be cited is after all nothing more than that whatever has pecuniary value—intangible as well as tangible property—is a subject of taxation.

That corporate powers and privileges have pecuniary value is attested by the continually growing extent of their use.

When the Federal Convention was in session there were but six corporations doing business in the United States.

Two hundred sixty-two thousand four hundred ninety corporations made returns under the Corporation Tax Law. They had a capital stock of $52,371,626,752, bonded and other debt of $31,333,952,696, and a net income—upon

stock—of $3,125,481,101. If this capitalization is substantial they have absorbed the major part of the taxable wealth of the country.

That the business of the corporation is affected with a public interest will not exempt it from taxation. No distinction of that sort is recognized in the adjudicated cases.

Public interest brings a business within the police power, but does not place it beyond the taxing power of the Government.

The policy of Government changes as to the exercise of police power over a business. One generation may regulate a business and another leave it free. The taxing power with respect to it remains the same.

A State may itself assume the conduct of a business, as South Carolina has done with respect to the liquor traffic, but that does not withdraw it from reach of the taxing power of the Government. *South Carolina* v. *United States*, 199 U. S. 437.

So the business of supplying water, light, power, and conducting transportation is just as much subject to taxation when carried on by quasi-public corporations as it was in earlier days when carried on in crude, simple ways by private individuals.

If by putting upon a business the stamp of public interest, a State could withdraw it from the sphere of national taxation, the General Government might be seriously impaired in its means of revenue.

The real question presented by the corporation tax is that of discrimination. Is the selection of corporations, individuals and partnerships not being included, arbitrary and unjust?

Government may tax one calling and leave another free, and so it may and does select between different species of property, and great freedom must be allowed in this respect. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

We lay an excise upon liquor and tobacco and not upon bread and meat, and there is here a purpose of discrimination, but that does not avoid the tax. We may select the objects of taxation for various reasons, convenience of collection, relation to ability to pay, discouragement of use, or whatever other reason may commend itself to the judgment of the lawmaker.

So we discriminate between callings. We may tax the doctor and exempt the lawyer, tax the shoemaker and leave the tailor free. We impose an excise upon the travelling vender and exempt the merchant with a fixed place of business. During the Civil War we differentiated peddlers into four classes, the first class being those who drove a four-horse van, and the fourth those who carried their packs upon their shoulders. We may fix such a tax at an arbitrary sum, or we may measure it by capital, or by the volume or the profits of the business.

Then why may we not discriminate in taxation between the corporation and the individual? The familiar illustration of the illegality of discrimination between the brown-haired and the red-haired man, the Protestant and the Catholic, is presented, but it is not to the purpose. We hold all men to be created equal, and to stand as equals before the law. In the differences of complexion and of creed there is nothing that has the attributes of property, nothing that makes for pecuniary gain, nothing related to the ability to bear the burdens of government.

Corporate powers and privileges are not like complexion and creed. They do have the attributes of property, they do make for gain, they do have relation to the ability to bear the burdens of government. And so they may be taxed as any other species of property, and a business conducted with their aid may be subjected to an excise when the same business conducted without their aid is left free.

In the methods provided for the assessment and collec-

tion of the tax there is no invasion of any constitutional right. Under the laws of every State in the Union individuals must make returns of their possessions. The taxgatherer may invade any household, and list its contents even to the humble utensils of the kitchen. The exercise of the taxing power is necessarily inquisitorial as to method, and must be so long as its demands are met with resentment and evasion. The law in that respect, and especially as amended, provides for nothing more than is reasonably necessary for the collection of the tax, and as to what is thus necessary the legislature must determine, and what it prescribes must be accepted unless it involves a clear violation of rights guaranteed by the Constitution. That the returns may become public is no objection to the requirement of them. The tax returns of individuals under state laws are public records and whosoever will may inspect them. Publicity in every relation of the citizen to the Government is essential to the proper conduct of Government, and no evils may be fairly apprehended from publicity in every detail of tax assessment and collection comparable with those which would surely result from secrecy.

MR. JUSTICE DAY delivered the opinion of the court.

These cases involve the constitutional validity of § 38 of the act of Congress approved August 5, 1909, known as "The Corporation Tax" law. 36 Stat. c. 6, 11, 112–117.

It is contended in the first place that this section of the act is unconstitutional, because it is a revenue measure, and originated in the Senate in violation of § 7 of Article I of the Constitution, providing that "all bills for the raising of revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." The history of the act

is contained in the Government's brief, and is accepted as correct, no objection being made to its accuracy.

This statement shows that the tariff bill, of which the section under consideration is a part, originated in the House of Representatives and was there a general bill for the collection of revenue. As originally introduced, it contained a plan of inheritance taxation. In the Senate the proposed tax was removed from the bill, and the corporation tax, in a measure, substituted therefor. The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose. In thus deciding we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate and approved by the President and duly deposited with the State Department. *Field* v. *Clark*, 143 U. S. 649; *Harwood* v. *Wentworth*, 162 U. S. 547; *Twin City Bank* v. *Nebeker*, 167 U. S. 196.

In order to have in mind some of the more salient features of the statute with a view to its interpretation, a part of the first paragraph is here set out, as follows (36 Stat. 11, 112, c. 6):

"SEC. 38. That every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject

to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed."

A reading of this portion of the statute shows the purpose and design of Congress in its enactment and the subject-matter of its operation. It is at once apparent that its terms embrace corporations and joint stock companies or associations which are organized for profit, and have a capital stock represented by shares. Such joint stock companies, while differing somewhat from corporations, have many of their attributes and enjoy many of their privileges. To these are added insurance companies, and they, as corporations, joint stock companies or associations, must be such as are now or hereafter organized under the laws of the United States or of any State or Territory of the United States, or under the acts of Congress applicable to Alaska and the District of Columbia. Each and all of these, the statute declares, shall be subject to pay annually a special excise tax with respect to the carrying on and doing business by such corporation, joint stock company or association, or insurance company. The tax is to be equivalent to one per cent of the entire net

income over and above $5,000 received by such corporation or company *from all sources* during the year, excluding, however, amounts received by them as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed by the statute. Similar companies organized under the laws of any foreign country and engaged in business in any State or Territory of the United States, or in Alaska or the District of Columbia, are required to pay the tax upon the net income over and above $5,000 received by them from business transacted and capital invested within the United States, the Territories, Alaska and the District of Columbia, during each year, with the like exclusion as to amounts received by them as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax imposed.

While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the pecul-

iarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any State or Territory, as heretofore stated.

This tax, it is expressly stated, is to be equivalent to one per centum of the entire net income over and above $5,000 received from *all sources* during the year—this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. This view of the measure of the tax is strengthened when we note that as to organizations under the laws of foreign countries the amount of net income over and above $5,000 includes that received from business transacted and capital invested in the United States, the Territories, Alaska and the District of Columbia.

It is further strengthened when the subsequent sections are considered as to deductions in ascertaining net income and requiring returns from those subject to the act. Under the second paragraph the net income is to be ascertained by certain deductions from the gross amount of income received within the year "from all sources;" and the return to be made to the collector of internal revenue

under the third section is required to show the gross amount of the income received during the year "from all sources." The evident purpose is to secure a return of the entire income, with certain allowances and deductions which do not suggest a restriction to income derived from property actively engaged in the business. This interpretation of the act, as resting upon the doing of business, is sustained by the reasoning in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, in which a special tax measured by the gross receipts of the business of refining oil and sugar was sustained as an excise in respect to the carrying on or doing of such business.

Having thus interpreted the statute in conformity, as we believe, with the intention of Congress in passing it, we proceed to consider whether, as thus construed, the statute is constitutional.

It is contended that it is not, certainly so far as the tax is measured by the income of bonds non-taxable under Federal statutes, and of municipal and state bonds beyond the Federal power of taxation. And so of real and personal estates, because as to such estates the tax is direct, and required to be apportioned according to population among the States. It is insisted that such must be the holding unless this court is prepared to reverse the income tax cases decided under the act of 1894. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *S. C.*, 158 U. S. 601.

The applicable provisions of the Constitution of the United States in this connection are found in Art. I, § 8, cl. 1, and in Art. I, § 2, cl. 3, and Art. I, § 9, cl. 4. They are respectively:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers."

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

It was under the latter requirement as to apportionment of direct taxes according to population that this court in the *Pollock Case* held the statute of 1894 to be unconstitutional. Upon the rehearing of the case Mr. Chief Justice Fuller, who spoke for the court, summarizing the effect of the decision, said:

"We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such." 158 U. S. 635.

And as to excise taxes, the Chief Justice said:

"We do not mean to say that an act laying by apportionment a direct tax on all real estate or personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments and vocations (p. 637)."

The *Pollock Case* was before this court in *Knowlton* v. *Moore*, 178 U. S. 41, 80. In that case this court sustained an excise tax upon the transmission of property by inheritance. It was contended there, as here, that the case was ruled by the *Pollock Case*, and of that case this court, speaking by the present Chief Justice, said:

"The issue presented in the *Pollock Case* was whether an income tax was direct within the meaning of the Constitution. The contentions which the case involved were thus presented. On the one hand, it was argued that only

capitation taxes and taxes on land as such were direct, within the meaning of the Constitution, considered as a matter of first impression, and that previous adjudications had construed the Constitution as having that import. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property, and it was affirmed that the previous adjudications of this court had settled nothing to the contrary.

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"Undoubtedly, in the course of the opinion in the *Pollock Case* it was said that if a tax was direct within the constitutional sense the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, *because imposed upon property solely by reason of its ownership*, could not be changed by affixing to it the qualifications of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.

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"Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely because of their general ownership of property* from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the

tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises, which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall."

The same view was taken of the *Pollock Case* in the subsequent case of *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

The act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Art. I, § 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts and excises, upon which the limitation is that they shall be uniform throughout the United States.

Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The *Pollock Case* construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

It is unnecessary to enter upon an extended consideration of the technical meaning of the term "excise." It has

been the subject-matter of considerable discussion—the terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution. As Mr. Chief Justice Fuller said in the *Pollock Case*, 157 U. S. 557:

"Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

And in the same connection the late Chief Justice, delivering the opinion of the court in *Thomas* v. *United States*, 192 U. S. 363, in speaking of the words duties, imposts and excises, said:

"We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

Duties and imposts are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." Cooley, Const. Lim., 7th ed., 680.

The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or quasi-corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the *Thomas Case*, 192 U. S. 363 *supra*, the requirement to pay such taxes involves the exercise of

privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable.

If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population. *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433; *Springer* v. *United States*, 102 U. S. 586; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

It is next contended that the attempted taxation is void because it levies a tax upon the exclusive right of a State to grant corporate franchises, because it taxes franchises which are the creation of the State in its sovereign right and authority. This proposition is rested upon the implied limitation upon the powers of National and state governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. It has been held in a number of cases that the State cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental functions of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank*, 9 Wheat. 738; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *California* v. *Central Pac. R. R. Co.*, 127 U. S. 1.

An examination of these cases will show that in each case where the tax was held invalid the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the Federal Government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers.

In *Osborn* v. *The Bank*, *supra*, a leading case upon the subject, whilst it was held that the Bank of the United States was not a private corporation, but a public one, created for national purposes, and therefore beyond the

taxing power of the State, Chief Justice Marshall, in delivering the opinion of the court, conceded that if the corporation had been originated for the management of an individual concern, with private trade and profit for its great end and principal object, it might be taxed by the State. Said the Chief Justice (p. 359):

"If these premises [that the corporation was one of private character] were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the Government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner."

The inquiry in this connection is: How far do the implied limitations upon the taxing power of the United States over objects which would otherwise be legitimate subjects of Federal taxation, withdraw them from the reach of the Federal Government in raising revenue, because they are pursued under franchises which are the creation of the States?

In approaching this subject we must remember that enactments levying taxes, as other laws of the Federal Government when acting within constitutional authority, are the supreme law of the land. The Constitution contains only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States. As Mr. Chief Justice Chase said, speaking for the court in *License Tax Cases*, 5 Wall. 462, 471: "Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited and thus only, it reaches every

subject and may be exercised at discretion." The limitations to which the Chief Justice refers were the only ones imposed in the Constitution upon the taxing power.

In *McCray* v. *United States*, 195 U. S. 27, this court sustained a Federal tax on oleomargarine, artificially colored, and held that while the Fifth and Tenth Amendments qualify, so far as applicable, all the provisions of the Constitution, nothing in those Amendments operates to take away the power to tax conferred by the Constitution on the Congress. In that case it was contended that the subject taxed was within the exclusive domain of the States, and that the real purpose of Congress was not to raise revenue, but to tax out of existence a substance not harmful of itself and one which might be lawfully manufactured and sold; but, the only constitutional limitation which this court conceded, in addition to the requirement of uniformity, and that for the sake of argument only so far as concerned the case then under consideration, was that Congress is restrained from arbitrary impositions or from exceeding its powers in seeking to effect unwarranted ends. The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others. *Patton* v. *Brady*, 184 U. S. 608, 622. And see *United States* v. *Singer*, 15 Wall. 111, 121; *Nicol* v. *Ames*, 173 U. S. 509, 515.

We must therefore enter upon the inquiry as to implied limitations upon the exercise of the Federal authority to tax because of the sovereignty of the States over matters within their exclusive jurisdiction, having in view the nature and extent of the power specifically conferred upon Congress by the Constitution of the United States. We must remember, too, that the revenues of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities, as are also reached by the States in order to support their local government.

While the tax in this case, as we have construed the statute, is imposed upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under authority of state franchises, it becomes necessary to consider in this connection the right of the Federal Government to tax the activities of private corporations which arise from the exercise of franchises granted by the State in creating and conferring powers upon such corporations. We think it is the result of the cases heretofore decided in this court, that such business activities, though exercised because of state-created franchises, are not beyond the taxing power of the United States. Taxes upon rights exercised under grants of state franchises were sustained by this court in *Railroad Co.* v. *Collector*, 100 U. S. 595; *United States* v. *Erie R. R. Co.*, 106 U. S. 327; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397.

It is true that in those cases the question does not seem to have been directly made, but, in sustaining such taxation, the right of the Federal Government to reach such agencies was necessarily involved. The question was raised and decided in the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533. In that well-known case a tax upon the notes of a state bank issued for circulation was sustained. Mr. Chief Justice Chase, in the course of the opinion said:

"Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

"We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that

franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

"But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue." (pp. 547, 548).

It is true that the decision in the *Veazie Bank Case* was also placed, in a measure, upon the authority of the United States to control the circulating medium of the country, but the force of the reasoning, which we have quoted, has not been denied or departed from.

In *Thomas* v. *United States*, 192 U. S. 363, a Federal tax on the transfer of corporate shares in state corporations was upheld as a tax upon business transacted in the exercise of privileges afforded by the state laws in respect to corporations.

In *Nicol* v. *Ames*, 173 U. S. 509, a Federal tax was sustained upon the enjoyment of privileges afforded by a board of trade incorporated by the State of Illinois.

When the Constitution was framed the right to lay excise taxes was broadly conferred upon the Congress. At that time very few corporations existed. If the mere fact of state incorporation, extending now to nearly all branches of trade and industry, could withdraw the legitimate objects of Federal taxation from the exercise of the power conferred, the result would be to exclude the National Government from many objects upon which indirect taxes could be constitutionally imposed. Let it be supposed that a group of individuals, as partners, were carrying on a business upon which Congress concluded to lay an excise tax. If it be true that the forming of a state corporation would defeat this purpose, by taking the necessary steps required by the state law to create a corporation and carrying on the business under rights granted by a state statute, the Federal tax would become invalid and that source of national revenue be destroyed, except as to the business in the hands of individuals or partnerships. It cannot be supposed that it was intended that it should be within the power of individuals acting under state authority to thus impair and limit the exertion of authority which may be essential to national existence.

In this connection *South Carolina* v. *United States*, 199 U. S. 437, 461, is important. In that case it was held that the agents of the state government, carrying on the business of selling liquor under state authority, were liable to pay the internal revenue tax imposed by the Federal Government. In the opinion previous cases in this court were reviewed, and the rule to be deduced therefrom stated to be that the exemption of state agencies and instrumentalities from national taxation was limited to those of a strictly governmental character, and did not extend to those used by the State in carrying on business of a private character.

The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the

governmental operations of the State. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws and similar governmental functions cannot be taxed by the Federal Government. *The Collector* v. *Day*, 11 Wall. 113; *United States* v. *Railroad Co.*, 17 Wall. 322; *Ambrosini* v. *United States*, 187 U. S. 1.

But this limitation has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the States. We, therefore, reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a State in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges.

But, it is insisted, this taxation is so unequal and arbitrary in the fact that it taxes a business when carried on by a corporation and exempts a similar business when carried on by a partnership or private individual as to place it beyond the authority conferred upon Congress. As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States. This subject was fully discussed and set at rest in *Knowlton* v. *Moore*, 178 U. S. 41, *supra*, and we can add nothing to the discussion contained in that case.

In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another. For examples of such taxation see

cases in the margin, decided in this court, upholding the power.[1]

Many instances might be given where this court has sustained the right of a State to select subjects of taxation, although as to them the Fourteenth Amendment imposes a limitation upon state legislatures, requiring that no per-

[1] *Hylton* v. *United States*, 3 Dall. 171 (a tax on carriages which the owner kept for private use); *Nicol* v. *Ames*, 173 U. S. 509 (a tax upon sales or exchanges of boards of trade); *Knowlton* v. *Moore*, 178 U. S. 41 (a tax on the transmission of property from the dead to the living); *Treat* v. *White*, 181 U. S. 264 (a tax on agreements to sell shares of stock, denominated "calls" by stockbrokers); *Patton* v. *Brady*, 184 U. S. 608 (a tax on tobacco manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article); *Cornell* v. *Coyne*, 192 U. S. 418 (a tax on "filled cheese" manufactured expressly for export); *McCray* v. *United States*, 195 U. S. 27 (a tax on oleomargarine not artificially colored, a higher tax on oleomargarine artificially colored, and no tax on butter artificially colored); *Thomas* v. *United States*, 192 U. S. 363 (a tax on sales of shares of stock in corporations); *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433 (a tax upon the amounts insured, renewed, or continued by insurance companies upon the gross amounts of premiums received and assessments made by them, and also upon dividends, undistributed sums, and incomes); *Veazie Bank* v. *Fenno*, 8 Wall. 533 (a tax of ten per centum on the amount of the notes paid out of any state bank, or state banking association); *Scholey* v. *Rew*, 23 Wall. 331 (a tax on devolutions of title to real estate); *Spreckels Sugar Refining Company* v. *McClain*, 192 U. S. 397 (a tax on the gross receipts of corporations and companies, in excess of $250,000, engaged in refining sugar or oil); *Railroad Co.* v. *Collector*, 100 U. S. 595 (a tax laid in terms upon the amounts paid by certain public service corporations as interest on their funded debt, or as dividends to their stockholders, and also on "all profits, incomes or gains of such company, and all profits of such company carried to the account of any fund, or used for construction." Held to be a tax upon the company's earnings and therefore essentially an excise upon the business of the corporations); *Springer* v. *United States*, 102 U. S. 586 (a duty provided by the internal revenue acts to be assessed, collected, and paid upon gains, profits, and incomes, held to be an excise or duty and not a direct tax).

son shall be denied the equal protection of the laws. See some of them noted in the margin.[1]

In *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, dealing with the Fourteenth Amendment, which in this respect imposes limitations only on state authority, this court said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not

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[1] *Beers* v. *Glynn*, 211 U. S. 477 (a state tax on personalty of non-resident decedents who owned realty in the State); *Hatch* v. *Reardon*, 204 U. S. 152 (a state tax on the transfers of stock made within the State); *Armour Packing Company* v. *Lacy*, 200 U. S. 226 (a state license tax on meat packing houses. A foreign corporation selling its products in the State, but whose packing establishments are not situated in the State, is not exempt from such license tax); *Savannah, Thunderbolt & Isle of Hope Railway* v. *Savannah*, 198 U. S. 392 (a classification which distinguishes between an ordinary street railway and a steam railroad, making an extra charge for local deliveries of freight brought over its road from outside the city, held, not to be such a classification as to make the tax void under the Fourteenth Amendment); *Cook* v. *Marshall County*, 196 U. S. 261 (a state tax on cigarette dealers); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283 (upholding the graded inheritance tax law of Illinois); *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232 (state tax upon the nominal face value of bonds, instead of their actual value, held a valid part of the state system of taxation).

allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution."

It is insisted in some of the briefs assailing the validity of this tax that these cases have been modified by *Southern R. R. Co.* v. *Greene*, 216 U. S. 400. In that case a corporation organized in a State, other than Alabama, came into that State in compliance with its laws, paid the license tax and property tax imposed upon other corporations doing business in the State, and acquired under direct sanction of the laws of the State a large amount of property therein, and, when it was attempted to subject it to a further tax on the ground that it was for the privilege of doing business as a foreign corporation, when the same tax was not imposed upon state corporations doing precisely the same business, in the same way, it was held that the attempted taxation was merely arbitrary classification, and void under the Fourteenth Amendment. In that case the foreign corporation was doing business under the sanction of the state laws no less than the local corporation; it had acquired its property under sanction of those laws; it had paid all direct and indirect taxes levied against it, and there was no practical distinction between it and a state corporation doing the same business in the same way.

In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corpo-

rations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.

It is further contended that some of the corporations, notably insurance companies, have large investments in municipal bonds and other non-taxable securities, and in real estate and personal property not used in the business, that therefore the selection of the measure of the income from all sources is void, because it reaches property which is not the subject of taxation—upon the authority of the *Pollock Case, supra.* But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed. In the *Pollock Case,* as we have seen, the tax was held unconstitutional, because it was in effect a direct tax on the property solely because of its ownership.

Nor does the adoption of this measure of the amount of the tax do violence to the rule laid down in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, nor the *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1. In the *Galveston Case* it was held that a tax imposed by the State of Texas, equal to one per cent upon the gross

receipts "from every source whatever" of lines of railroad lying wholly within the State, was invalid as an attempt to tax gross receipts derived from the carriage of passengers and freight in interstate commerce, which in some instances was much the larger part of the gross receipts taxed. This court held that this act was an attempt to burden commerce among the States, and the fact that it was declared to be "equal to" one per cent made no difference, as it was merely an effort to reach gross receipts by a tax not even disguised as an occupation tax, and in nowise helped by the words "equal to." In other words, the tax was held void, as its substance and manifest intent was to tax interstate commerce as such.

In the *Western Union Telegraph Case* the State undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in commerce among the States, as a condition of doing local business within the State of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid.

There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the prop-

erty as such and to measure a legitimate tax upon the privileges involved in the use of such property.

In *Home Ins. Co.* v. *New York*, 134 U. S. 594, a tax was sustained upon the right or privilege of the Home Insurance Company to be a corporation, and to do business within the State in a corporate capacity, the tax being measured by the extent of the dividends of the corporation in the current year upon the capital stock. Although a very large amount, nearly two of three millions of capital stock was invested in bonds of the United States, expressly exempted from taxation by a statute of the United States, the tax was sustained as a mode of measurement of a privilege tax which it was within the lawful authority of the State to impose. Mr. Justice Field, who delivered the opinion of the court, reviewed the previous cases in this court, holding that the State could not tax or burden the operation of the Constitution and of laws enacted by the Congress to carry into execution the powers vested in the General Government. Yielding full assent to those cases, Mr. Justice Field said of the tax then under consideration: "It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year." In that case, in the course of the opinion, previous cases of this court were cited, with approval, *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611.

In the *Coite Case* a privilege tax upon the total amount of deposits in a savings bank was sustained, although $500,000 of the deposits had been invested in securities of the United States, and declared by act of Congress to be exempt from taxation by state authority. In that case the court said: "Nothing can be more certain in legal

decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the state government. Authority to that effect resides in the State independently of the Federal Government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in Federal securities." In *Provident Institution* v. *Massachusetts*, *supra*, a like tax was sustained.

It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connection *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, as interpreted in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 226.

It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large

capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.

It is true that in the *Spreckels Case*, 192 U. S. *supra*, the excise tax, for the privilege of doing business, was based upon the business assets in use by the company, but this was because of the express terms of the statute which thus limited the measure of the excise. The statute now under consideration bears internal evidence that its draftsman had in mind language used in the opinion in the *Spreckels Case*, and the measure of taxation, the income from all sources, was doubtless inserted to prevent the limitation of the measurement of the tax to the income from business assets alone. There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business. Departures from that rule sustained in this court are not wanting. In *United States* v. *Singer*, 15 Wall. 111, an excise tax was sustained upon the liquor business, which was fixed by the payment on an amount not less than 80 per cent of the total capacity of the distillery. Whether such capacity was used in the business was a matter of indifference, and this court said of such a measure:

"Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the produc-

ing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertakes to distill at all, he is not entitled to much consideration."

In *Society for Savings* v. *Coite*, 6 Wall. *supra*, and *Provident Institution* v. *Massachusetts*, 6 Wall. *supra*, as we have seen, the amount of excise was measured by the amount of bank deposits. It made no difference that the deposits were not used actively in the business.

In *Hamilton Company* v. *Massachusetts*, 6 Wall. 632, the tax was measured by the excess of the market value of the corporation's capital stock above the value of its real estate and machinery, and in this connection see *Home Ins. Co.* v. *New York*, 134 U. S. *supra*, where the excise was computed upon the entire capital stock measured by the extent of the dividends thereon.

We must not forget that the right to select the measure and objects of taxation devolves upon the Congress and not upon the courts, and such selections are valid unless constitutional limitations are overstepped. "It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed." *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27, 58, and previous cases in this court there cited.

Nor is that line of cases applicable, such as *Brown* v. *Maryland*, 12 Wheat. 419, holding that a tax on the sales of an importer is a tax on the import, and *Cook* v. *Pennsylvania*, 97 U. S. 566, holding a tax on auctioneer's sales of goods in original packages a tax on imports. In these cases the tax was held invalid, as the State thereby taxed subjects of taxation within the exclusive power of Congress.

What we have said as to the power of Congress to lay this excise tax disposes of the contention that the act is void as lacking in due process of law.

It is urged that this power can be so exercised by Congress as to practically destroy the right of the States to create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in *McCulloch* v. *Maryland* that the power to tax involves the power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the powers of Congress. Of such contention this court said in *Knowlton* v. *Moore*, *supra*:

"This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied."

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, *supra*, speaking for the court, the Chief Justice said:

"It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

"The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon per-

sons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

To the same effect: *McCray* v. *United States*, 195 U. S. 27. In the latter case it was said:

" . . . no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust."

And in the same case this court said, after reviewing the previous cases in this court:

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may be not judicially restrained because of the results to arise from its exercise."

The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice.

It is especially objected that certain of the corporations whose stockholders challenge the validity of the tax, are so-called real estate companies, whose business is principally the holding and management of real estate. These cases are No. 415, *Cedar Street Company* v. *Park Realty Company;* No. 431, *Percy H. Brundage* v. *Broadway Realty*

Company; No. 443, *Phillips* v. *Fifty Associates;* No. 446, *Mitchell* v. *Clark Iron Company;* No. 412, *William H. Miner* v. *Corn Exchange Bank;* and No. 457, *Cook* v. *Boston Wharf Company.*

In No. 412, *Miner* v. *Corn Exchange Bank,* the bank occupies a building in part and rents a large part to tenants.

Of the realty companies, the Park Realty Company was organized to "work, develop, sell, convey, mortgage or otherwise dispose of real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and other property, real or personal," etc.

At the time the bill was filed the business of the company related to the Hotel Leonori, and the bill averred that it was engaged in no other business except the management and leasing of that hotel.

The Broadway Realty Company was formed for the purpose of owning, holding and managing real estate. It owns an office building and certain securities. The office building is let to tenants, to whom light and heat are furnished, and for whom janitor and similar service are performed.

The Fifty Associates are operating under a charter to own real estate with power to build, improve, alter, pull down and rebuild, and to manage, exchange and dispose of the same.

The Clark Iron Company was organized under the laws of Minnesota, owns and leases ore lands for the purpose of carrying on mining operations, and receives a royalty depending upon the quantity of ore mined.

The Boston Wharf Company is operating under a

charter authorizing it to acquire lands and flats, with their privileges and appurtenances, and to lease, manage and improve its property in whatever manner shall be deemed expedient by it, and to receive dockage and wharfage for vessels laid at its wharves.

What we have said as to the character of the corporation tax as an excise disposes of the contention that it is direct, and therefore requiring apportionment by the Constitution. It remains to consider whether these corporations are engaged in business. "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244. "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. I, p. 273.

We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

Of the *Motor Taximeter Cab Company Case*, No. 432, the company owns and leases taxicabs, and collects rents therefrom. We think it is also doing business within the meaning of the statute.

What we have already said disposes of the objections made in certain cases of life insurance and trust companies, and banks, as to income derived from United States, state, municipal or other non-taxable bonds.

We come to the question: Is a so-called public service corporation, such as The Coney Island and Brooklyn Railroad Company, in case No. 409, and the Interborough

Rapid Transit Company, No. 442, exempted from the operation of this statute? In the case of *South Carolina* v. *United States*, 199 U. S. 437, this court held that when a State, acting within its lawful authority, undertook to carry on the liquor business it did not withdraw the agencies of the State carrying on the traffic from the operation of the internal revenue laws of the United States. If a State may not thus withdraw from the operation of a Federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue.

It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the State in carrying out its purposes; the latter, although regulated by the State, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation.

Applying this principle, we are of opinion that the so-

called public service corporations, represented in the cases at bar, are not exempt from the tax in question. *Railroad Co.* v. *Peniston*, 18 Wall. 5, 33.

It is again objected that incomes under $5,000 are exempted from the tax. It is only necessary, in this connection, to refer to *Knowlton* v. *Moore*, 178 U. S. *supra*, in which a tax upon inheritances in excess of $10,000 was sustained. In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293, a graded inheritance tax was sustained.

As to the objections that certain organizations, labor, agricultural and horticultural, fraternal and benevolent societies, loan and building associations, and those for religious, charitable or educational purposes, are excepted from the operation of the law, we find nothing in them to invalidate the tax. As we have had frequent occasion to say, the decisions of this court from an early date to the present time have emphasized the right of Congress to select the objects of excise taxation, and within this power to tax some and leave others untaxed, must be included the right to make exemptions such as are found in this act.

Again, it is urged that Congress exceeded its power in permitting a deduction to be made of interest payments only in case of interest paid by banks and trust companies on deposits, and interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of the corporation or company. This provision may have been inserted with a view to prevent corporations from issuing a large amount of bonds in excess of the paid-up capital stock, and thereby distributing profits so as to avoid the tax. In any event, we see no reason why this method of ascertaining the deductions allowed should invalidate the act. Such details are not wholly arbitrary, and were deemed essential to practical operation. Courts cannot substitute their judg-

ment for that of the legislature. In such matters a wide range of discretion is allowed.

The argument that different corporations are so differently circumstanced in different States, and the operation of the law so unequal as to destroy it, is so fully met in the opinion in *Knowlton* v. *Moore*, 178 U. S. 41, *supra*, that it is only necessary to make reference thereto. For this purpose the law operates uniformly, geographically considered, throughout the United States, and in the same way wherever the subject-matter is found. A liquor tax is not rendered unlawful as a revenue measure because it may yield nothing in those States which have prohibited the liquor traffic. No more is the present law unconstitutional because of inequality of operation owing to different local conditions.

Nor is the special objection tenable, made in some of the cases, that the corporations act as trustees, guardians, etc., under the authority of the laws or courts of the State. Such trustees are not the agents of the state government in a sense which exempts them from taxation because executing the necessary governmental powers of the State. The trustees receive their compensation from the interests served, and not from the public revenues of the State.

It is urged in a number of the cases that in a certain feature of the statute there is a violation of the Fourth Amendment of the Constitution, protecting against unreasonable searches and seizures. This Amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws. *Boyd* v. *United States*, 116 U. S. 632. It does not prevent the issue of search warrants for the seizure of gambling paraphernalia and other illegal matter. *Adams* v. *New York*, 192 U. S. 585. It does not prevent the issuing of process to require at-

tendance and testimony of witnesses, the production of books and papers, etc. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25. Certainly the Amendment was not intended to prevent the ordinary procedure in use in many, perhaps most, of the States of requiring tax returns to be made, often under oath. The objection in this connection applies, when the substance of the argument is reached, to the sixth section of the act, which provides:

"Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such."

An amendment was made June 17, 1910, which reads as follows:

"For classifying, indexing, exhibiting and properly caring for the returns of all corporations, required by section thirty-eight of an act entitled 'An act to provide revenue, equalize duties, encourage the industries of the United States, and for other purposes,' approved August fifth, nineteen hundred and nine, including the employment in the District of Columbia, of such clerical and other personal services and for rent of such quarters as may be necessary, twenty-five thousand dollars: *Provided*, That any and all such returns shall be open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President."

The contention is that the above section as originally framed and as now amended could have no legitimate connection with the collection of the tax, and in substance amounts to no more than an unlawful attempt to exhibit the private affairs of corporations to public or private inspection, without any substantial connection with or

legitimate purpose to be subserved in the collection of the tax under the act now under consideration. But we cannot agree to this contention. The taxation being, as we have held, within the legitimate powers of Congress, it is for that body to determine what means are appropriate and adapted to the purposes of making the law effectual. In this connection the often quoted declaration of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, is appropriate: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional."

Congress may have deemed the public inspection of such returns a means of more properly securing the fullness and accuracy thereof. In many of the States laws are to be found making tax returns public documents, and open to inspection.[1]

[1] In Connecticut, the requirement is that the tax lists of the assessors shall be abstracted and lodged in the town clerk's office "for public inspection." R. S. Conn., 1902, § 2310. In New York, notices of the completion of the assessment rolls must be conspicuously posted in three or more public places, and a copy left in a specified place, "where it may be seen and examined by any person until the third Tuesday of August next following." Consol. Laws of N. Y., vol. 5, p. 5859; Laws N. Y., 1909, c. 62, § 36. In Maryland, a record of property assessed is required to be kept, and the valuation thereof with alphabetical list of owners recorded in a book, "which any person may inspect without fee or reward." Pub. Laws Md., vol. 2, p. 1804, § 23. In Pennsylvania, it is provided that from the time of publishing the assessor's returns until the day appointed for finally determining whether the assessor's valuations are too low, "any taxable inhabitant of the county shall have the right to examine the said return in the commissioner's office." Pepper & Lewis' Dig. Laws Pa., vol. 2, p. 4591, § 357. In New Hampshire, the list of taxes assessed are required to be kept in a book, and also left with the town clerk, and such records "shall be open to the inspection of all persons." Pub. Stat. N. H., 1901, p. 214, § 5.

We cannot say that this feature of the law does violence to the constitutional protection of the Fourth Amendment, and, this is equally true of the Fifth Amendment, protecting persons against compulsory self-incriminating testimony. No question under the latter Amendment properly arises in these cases, and when circumstances are presented which invoke the protection of that Amendment and raise questions involving rights thereby secured it will be time enough to decide them. And so of the argument that the penalties for the non-payment of the taxes are so high as to violate the Constitution. No case is presented involving that question, and, moreover, the penalties are clearly a separate part of the act, and whether collectible or not may be determined in a case involving an attempt to enforce them. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53.

It has been suggested that there is a lack of power to tax foreign corporations, doing local business in a State, in the manner proposed in this act, and that the tax upon such corporations, being unconstitutional, works such inequality against domestic corporations as to invalidate the law. It is sufficient to say of this that no such case is presented in the record. *Southern Railway Co.* v. *King*, 217 U. S. 525. This is equally true as to the alleged invalidity of the act as a tax on exports, which is beyond the power of Congress. No such case is presented in those now before the court.

We have noticed such objections as are made to the constitutionality of this law as it is deemed necessary to consider. Finding the statute to be within the constitutional power of the Congress, it follows that the judgments in the several cases must be affirmed.

Affirmed.